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Supreme Court, U.S.
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In The

# Supreme Court of the United States

TEXTRON FUNDING CORPORATION
and
ASSOCIATES FINANCIAL SERVICES
COMPANY, INC.

*Petitioners,*

v.

CHERYL BESSETTE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## PETITION FOR A WRIT OF CERTIORARI


WILLIAM P. ROBINSON III
*Counsel of Record*
PATRICIA A. SULLIVAN
JON M. ANDERSON
EDWARDS & ANGELL, LLP
2800 Financial Plaza
Providence, RI 02903-2499
(401) 274-9200 (Main No.)
(401) 276-6611 (Fax No.)

MARY GRACE DIEHL
A. WILLIAM LOEFFLER
TROUTMAN SANDERS LLP
Bank of America Plaza
600 Peachtree Street N.E./
Suite 6200
Atlanta, GA 30308-2216
(404) 885-3000 (Main No.)
(404) 885-3990 (Fax No.)

*Attorneys for Petitioners*



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OR CALL COLLECT (402) 342-2831


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## QUESTION PRESENTED

This case presents issues of significant importance both to consumer/debtors and lender/creditors and to the bankruptcy courts charged with enforcement of the provisions of the Bankruptcy Code. The decision of the Court of Appeals for the First Circuit in this case is directly contrary to the decisions of the Sixth and Seventh Circuits although all three present substantially identical facts. The Supreme Court should grant the writ of certiorari to resolve this serious split in the circuits. The question presented is as follows:

> Is the remedy of a debtor, represented by counsel, who fully pays reaffirmed debt so as to retain the collateral, but nevertheless alleges injury from the collection of a discharged debt because of the failure to comply with the statutory requirements for an enforceable reaffirmation agreement, a contempt proceeding before the bankruptcy court that issued the discharge or does Section 105 of the Bankruptcy Code create a substantive implied cause of action for damages, which may be brought as a putative class action in any federal court where the creditor may be served?

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Defendants-Petitioners Avco Financial Services, Inc. ("AFS"), Avco Financial Services Management Co. ("AFS-Management"), Avco Financial Services of Rhode Island, Inc. ("AFS-RI"), and Avco Financial Services of Colorado, Inc. ("AFS-CO") (collectively, "Avco") make the following corporate disclosures:

### 1. Defendant-Petitioner Directly Owned by Textron, Inc.

AFS changed its corporate name to Textron Funding Corp. on January 7, 1999. On April 12, 2000, ownership of Textron Funding Corp. was transferred to Textron Financial Corporation, which is a wholly-owned subsidiary of Textron, Inc., a publicly traded company.

### 2. Defendants-Petitioners Indirectly Owned by Citigroup Inc.

Defendant-Petitioner AFS-Management merged into Associates Financial Services Company of Delaware, Inc., on September 1, 1999. Associates Financial Services Company of Delaware, Inc., merged into Associates Financial Services Company, Inc., on November 22, 1999.

Defendant-Petitioner AFS-RI merged into Associates Financial Services Company of Rhode Island, Inc., on November 20, 2000. Associates Financial Services Company of Rhode Island, Inc., is a wholly-owned subsidiary of Associates Financial Services Company, Inc.

**RULE 29.6 STATEMENT** – Continued

Defendant-Petitioner AFS-CO merged into Associates Financial Services Company of Colorado, Inc., on September 1, 1999. Associates Financial Services Company of Colorado, Inc., merged into Associates Financial Services Company, Inc., on November 22, 1999.

Associates Financial Services Company, Inc., is a wholly-owned subsidiary of Associates Investment Company, which is a wholly-owned subsidiary of Associates Corporation of North America, which is a wholly-owned subsidiary of Associates First Capital Corporation. Associates First Capital Corporation is a wholly-owned subsidiary of Citicorp, which is a wholly-owned subsidiary of Citigroup Holdings Company, which is a wholly-owned subsidiary of Citigroup Inc., which is a publicly traded company.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Avco Financial Services, Inc., Avco Financial Services Management Co., Avco Financial Services of Rhode Island, Inc., and Avco Financial Services of Colorado, Inc., (collectively, "Avco") respectfully request that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The decision of the United States District Court for the District of Rhode Island dismissing the debtor's complaint purporting to set forth an implied cause of action for damages sustained in making voluntary payments in connection with an unenforceable reaffirmation agreement is reported at *Bessette v. Avco Fin. Servs., Inc.*, 240 B.R. 147 (D.R.I. 1999), and is reprinted in the Appendix at App. 26-55. The decision of the United States Court of Appeals for the First Circuit vacating the decision of the District Court by holding that 11 U.S.C. § 105 supports such a cause of action is reported (as amended) at *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439 (1st Cir. 2000), and is reprinted in the Appendix at App. 1-23.

## STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the First Circuit from which Petitioners seek review by this Court was originally issued on October 27, 2000. On December 15, 2000, the Court of Appeals denied

Avco's petition for rehearing and suggestion for rehearing *en banc*, but it amended its earlier opinion. Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The relevant constitutional provision and statutes in this case, U.S. Const. art. I, § 8, cl. 4 (Congressional power to establish bankruptcy law), 11 U.S.C. § 105 (authorizing a court to carry out "the provisions of this title"), 11 U.S.C. § 362 (automatic stay), 11 U.S.C. § 524 (effect of discharge), 11 U.S.C. § 727 (discharge in bankruptcy), and 28 U.S.C. § 1651 (All Writs Act) are reproduced in the Appendix at App. 59-87.

## STATEMENT OF THE CASE

This case centers on whether the failure to comply with the statutory requirements for an enforceable reaffirmation agreement under Section 524 of the Bankruptcy Code ("Code") may be remedied through a civil action for damages arising under Section 105 of the Code despite the decision of Congress not to enact such a remedy.

Respondent Cheryl Bessette ("Bessette") purchased bedroom furniture on a revolving charge account provided by Cardi's Furniture, on which Avco was the credit provider. App. 94 (¶ 27). On August 7, 1995, Bessette filed for Chapter 7 bankruptcy in the District of Rhode Island. App. 94 (¶ 26). In connection with that filing, she stated

her intention to redeem the furniture. App. 208-215. Several weeks later, after negotiation with the assistance of her counsel, Bessette executed an agreement to reaffirm $1,500 of her prior debt and thereby retain her bedroom furniture. App. 90 (¶ 10), 94-95 (¶ 28), 95 (¶ 29) & 124-25 (Ex. B). The reaffirmation included the declaration of her attorney that he represented her in the negotiation of the agreement and that he was satisfied that she had made a fully informed and voluntary agreement and that it imposed no undue hardship on her. App. 94-95 (¶ 28) & 124-25 (Ex. B).

Although properly executed by Bessette and her attorney prior to the discharge, the reaffirmation agreement was not enforceable because neither Bessette's attorney nor Avco filed it in the bankruptcy court, App. 95 (¶ 30), and it lacked certain language required by 11 U.S.C. § 524(c). App. 95-96 (¶¶ 32-34). Thereafter, despite the discharge issued pursuant to 11 U.S.C. § 727(b), which extinguished Avco's in personam claim against Bessette for the debt, she paid the reaffirmed amount in full and continued to have use of the bedroom furniture. App. 96 (¶ 37).

On August 25, 1997, Bessette commenced a putative nationwide class action against Avco in the United States District Court for the District of Rhode Island. She was joined in the complaint by a second putative class representative, Francisco Gonzalez, a resident of California, whose discharge had been entered in the Eastern District of California. App. 97 (¶ 44). They claimed, *inter alia*, an implied right to relief under the Code, 11 U.S.C. § 524 (Counts I (11 U.S.C. § 524(a)(2)) and II (11 U.S.C. § 524(c)). App. 107-09. Nowhere in their pleadings did

they invoke 11 U.S.C. § 105(a) or refer to the contempt power of the bankruptcy court. Instead, their complaint recited that the District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 1334. App. 89 (¶ 2).

On October 18, 1999, the District Court analyzed whether the framework set out in *Cort v. Ash*, 422 U.S. 66, 78 (1975), justifies the judicial creation of a private right of action emanating from either Section 524 or Section 105. App. 32-40. After a thorough discussion of each of the *Cort* factors, the District Court concluded that Congress did not intend to create a private right of action under either Section 524 or Section 105 and that plaintiffs' remedies, if any, are based on their ability to reopen their respective bankruptcies and "bring a claim in contempt requesting relief pursuant to the court's inherent contempt power or under the § 105 statutory contempt power." App. 37. Judge Lagueux granted Avco's motion to dismiss for failure to state a claim; final judgment entered on November 15, 1999. App. 56.

Gonzalez and Bessette appealed to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1292; Gonzalez abandoned his appeal before briefing and argument. App. 3 n.2. On October 27, 2000, the Court of Appeals, relying on 11 U.S.C. § 105, ignoring the plain language of Section 524(a)(2) and contravening this Court's proscription in *Cort* against the creation of implied causes of action except where justified as consistent with clear Congressional intent, vacated the District Court's decision. App. 21.

Less than a month later, on November 22, 2000, the Court of Appeals for the Sixth Circuit issued its decision

in *Pertuso v. Ford Motor Credit Corp.*, 233 F.3d 417 (6th Cir. 2000), in which it expressly rejected the reliance of the Court of Appeals for the First Circuit on 11 U.S.C. § 105. It held instead that Section 105 vests bankruptcy courts with statutory contempt powers but does not authorize courts to create new substantive rights. *Id.* at 423 n.1. Whereas *Bessette* expressly declined to perform the *Cort* inquiry to determine whether Section 524 includes an implied cause of action, *Pertuso* relied on *Cort's* traditional four-step analysis to hold that Congress never intended debtors to sue for damages for unfiled reaffirmation agreements. *Compare Pertuso*, 233 F.3d at 421-23 (citing *Cort*, 422 U.S. at 78) *with Bessette*, App. 8. *Pertuso* also disagreed with the *Bessette* court's conclusion that a creditor's acceptance of post-discharge payments from debtors, who were represented by counsel and who had previously stated their intent to reaffirm, necessarily constitutes reprehensible conduct. *Compare Bessette*, App. 2 (condemns "wrongful" practice) *with Pertuso*, 233 F.3d at 424-25 (facts in complaint do not evince conduct contrary to what a reasonable person would consider to be fair). On December 15, 2000, the *Bessette* panel amended its decision but did not resolve the serious discrepancy between its decision and *Pertuso*. App. 22-23.

On February 8, 2001, in an opinion by Judge Posner, the Court of Appeals for the Seventh Circuit added to the confusion facing debtors, creditors and courts, when it issued its decision in *Cox v. Zale Del., Inc.*, 239 F.3d 910 (7th Cir. 2001). *Cox* agrees with the result reached by *Pertuso* but does not follow its reasoning: *Cox* does not perform the *Cort* analysis but rather focuses on the plain

meaning of Section 524. *Id.* at 914-15.[1] Like *Pertuso*, but directly contrary to *Bessette*, *Cox* held that a suit for violation of Section 524(c) can be brought only as a contempt action under Section 524(a)(2) by reopening the bankruptcy and that such affirmative relief can be sought only in the bankruptcy court that issued the discharge. *Id.* at 916-17. Also like *Pertuso*, *Cox* found the fact that the debtor was represented by counsel, had paid the reaffirmed portion of the debt in full and had kept the collateral rendered the 524(c) violation "technical, trivial and arguably, indeed, condoned and hence no violation at all, and certainly not the sort of thing that would warrant a proceeding for contempt." *Id.* at 915.

This split among the circuits affects the interpretation of two of the most critical provisions of the Code: Section 524 and Section 105.

Section 524 of the Code sets out the effects of a discharge. 11 U.S.C. § 524. It states that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt." *Id.* § 524(a)(2). Section 524(c) specifies the circumstances

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[1] Despite their divergent outcomes as a matter of law, the key facts in *Cox*, *Pertuso* and *Bessette* are the same: (1) the plaintiff debtors, advised by counsel, entered into reaffirmation agreements with the defendant creditors; (2) the reaffirmation agreements were not filed with the bankruptcy court; (3) the debtors paid their reaffirmed debts in full after the discharge; and (4) the debtors retained the collateral (a ring, a van, and bedroom furniture, respectively). *Compare Cox*, 239 F.3d at 912-13 *with Pertuso*, 233 F.3d at 419-20, 424-25 *with Bessette*, App. 27-29.

under which debtor and creditor may agree to the post-discharge payment of pre-petition debt, so that their agreement is enforceable by either of them; it provides that the reaffirmation agreement must include certain statements and a specified declaration if the debtor is represented by counsel. It further provides that the agreement is to be filed with the bankruptcy court.[2] Section 524(c) is silent as to the party on whom these duties are imposed.[3] It simply makes clear that failure to comply renders the agreement unenforceable by either party. *Id.* § 524(c). Section 524 also makes clear that a debtor may make voluntary payments to any creditor after the discharge even in the absence of an enforceable reaffirmation agreement. *Id.* § 524(f); *see Cox*, 239 F.3d at 916; *Pertuso*, 233 F.3d at 424-25.

Section 105 is the provision of the Code that authorizes courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Section 105 vests the bankruptcy courts with statutory contempt powers, though it does not authorize them to create substantive rights that

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[2] In *Cox*, Judge Posner cogently explained at least one economic rationale which might motivate both the creditor and the debtor to reaffirm. *Cox*, 239 F.3d at 912-13.

[3] *Cf. Sweet v. Bank of Okla. (In re Sweet)*, 954 F.2d 610, 613 (10th Cir. 1992) (*pro se* debtor has the burden to appear, and creditor does not have the duty to monitor the debtor's appearance); *BankBoston, N.A. v. Claflin (In re Claflin)*, 249 B.R. 840, 843-44 (1st Cir. B.A.P. 2000) (only debtor may seek approval of reaffirmation agreement); *In re Kamps*, 217 B.R. 836, 843 n.13 (Bankr. C.D. Cal. 1998) (only the debtor may seek bankruptcy court approval of a reaffirmation agreement); Bankr. R. 4008 (motion for reaffirmation shall be filed by the debtor).

are otherwise unavailable under law. *Pertuso*, 233 F.3d at 423 n.1. Section 105 is modeled after the All Writs Act, 28 U.S.C. § 1651. *See* H.R. Rep. No. 95-595, at 316 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6273. "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." *Pa. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985). Like Section 105, the All Writs Act does *not* confer jurisdiction independently or create new substantive rights or authorize writs contrary to statute. *See Clinton v. Goldsmith*, 526 U.S. 529, 537-38 (1999); *Carlisle v. United States*, 517 U.S. 416, 429 (1996); *Pa. Bureau*, 474 U.S. at 43; *One Hundred Pearl Ltd. v. Vantage Secs., Inc.*, No. 93 CIV. 7214 (PKL), 1997 WL 401670, at *2-3 (S.D.N.Y. July 16, 1997) (All Writs Act may not be used to impose a retrospective monetary obligation akin to a damages remedy).

While the decisions in the Sixth and Seventh Circuits adhere strictly to the procedures set out in the plain language of the Code, *Bessette* permits any bankrupt debtor, believing that there has been some violation of the discharge injunction, to choose whether to raise that complaint by reopening his bankruptcy and relying on the bankruptcy procedures created by Congress or – in the First Circuit – by filing a civil action for damages in any court without regard to the bankruptcy court that issued the discharge and without regard for the Code or the Bankruptcy Rules. Thus, *Bessette* undermines the intricately calibrated structure established by Congress in the wake of *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Effectively, *Bessette* renders the Code

provisions governing post-discharge collection enforceable at the option of the debtor in an original civil action for damages.

As a practical matter, the divergent outcomes in these three cases create an even more intolerable intercircuit conflict because each case purports to be a nationwide class action based on substantially the same facts, yet the outcome for the plaintiffs is solely a function of the forum chosen. *See* Report of the Fed. Courts Study Comm'n 125 (1990). The claims of putative class members in *Bessette* who reside in the Sixth and Seventh Circuits remain alive despite *Cox* and *Pertuso*, yet the claims of putative class members in *Cox* and *Pertuso* who reside in the First Circuit are dead despite *Bessette*.[4] The arbitrariness of *Bessette* is even greater because any debtor of Ford Motor Credit Corp. or Zale Delaware other than Cox or the Pertusos can resurrect those nationwide class actions simply by refiling in any court in the First Circuit having personal jurisdiction over the defendant, despite the decisions in the Sixth and Seventh Circuits to the contrary. *Cf. Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("nationwide class actions may have a detrimental effect by foreclosing adjudication by a number of different courts and judges").

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[4] If these inconsistencies are allowed to stand, plaintiffs and defendants would be subject to the legal anarchy so well summarized by Pascal in his Penseés (No. 151): "Curious justice that a river bounds! Truth on one side of the Pyrenees; error on the other." *See United States v. McPartlin*, 595 F.2d 1321, 1343 n.28 (7th Cir. 1979) (quoting both the French original and the English translation).

Notwithstanding what the Courts of Appeals for the Sixth and Seventh Circuits have said, multistate creditors like Avco, Ford Motor Credit Corp., and Zale Delaware (and all those identified in footnote five, *infra*) have no choice but to conduct themselves in accordance with the most restrictive rule in resolving nationwide class actions. *Cf. Celotex Corp. v. Edwards*, 514 U.S. 300, 301-02 (1995) (multistate defendant cannot be subject to different rules). The dualing class actions have already started. *Compare Walls v. Wells Fargo Bank, N.A.*, 255 B.R. 38, 45 (E.D. Cal. 2000), *appeal docketed*, No. 00-17036 (9th Cir. Oct. 27, 2000) (dismissing case) *with Singleton v. Wells Fargo Bank, N.A.*, Bk. No. 95-11298 ANV, Adv. Proc. No. 00-1026 (Bankr. D.R.I. Feb. 12, 2001) (motion for nationwide class based on *Bessette*).

Accordingly, this Court should grant the writ of certiorari sought by Avco lest the flawed analysis of *Bessette* effectively checkmate the holdings of the Courts of Appeals for the Sixth and Seventh Circuits and become as a practical matter the law of the land.[5]

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[5] The confusion in the trial courts is even greater. Four courts have joined *Pertuso* and rejected the notion that either Section 524 or Section 105 supports an implied cause of action. *Bassett v. Am Gen. Fin., Inc. (In re Bassett)*, 255 B.R. 747, 756 (B.A.P. 9th Cir. 2000), *appeal docketed*, No. 01-35001 (9th Cir. Jan. 3, 2001); *Transamerica Fin. Serv. v. Danney*, No. 99-228-P-H, 1999 WL 33117201, *2-3 (D. Me. Dec. 23, 1999); *Costa v. Welch (In re Costa)*, 172 B.R. 954, 963 (Bankr. E.D. Cal. 1994); *In re Jackson*, 49 B.R. 298, 302 (Bankr. D. Kan. 1985).

## REASONS FOR GRANTING THE WRIT

**The Court of Appeals for the First Circuit Has Rendered a Decision in Direct Conflict with Decisions of the Courts of Appeals for the Sixth and Seventh Circuits Regarding Whether Section 105 of the Code Creates a Substantive Right of Action for Damages for Violations of Section 524 of the Bankruptcy Code Governing Reaffirmation Agreements through a Civil Action Independent of the Bankruptcy and the Court that Issued the Discharge**

The United States Court of Appeals for the Sixth Circuit has expressly rejected the holding of *Bessette* that

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Another ten courts have held that Section 524 does not give rise to an implied cause of action; these cases do not address Section 105. *See DuBois v. Ford Motor Credit Co.*, Civ. File No. 00-1447 (PAM/SRN), slip op. at 7-11 (D. Minn. Jan. 19, 2001); *Walls*, 255 B.R. at 45; *Kibler v. WFS Fin., Inc.*, No. CV-00-5217 LGB RNBX, 2000 WL 1470655, at *8 (C.D. Cal. Sept. 13, 2000); *Williams v. Sears Roebuck & Co. (In re Williams)*, 244 B.R. 858, 867 (S.D. Ga. 2000); *Peterson v. Wells Fargo Bank, N.A.*, No. CV-99-6389, 2000 WL 1225788, at *6 (E.D. Cal. Aug. 17, 2000); *Pereira v. First N. Am. Nat'l Bank*, 223 B.R. 28, 30 (N.D. Ga. 1998); *Sullivan v. All States Lumber, Inc. (In re Sullivan)*, 90 B.R. 307, 309 (M.D. Tenn. 1988); *Lesniewski v. Kamin (In re Lesniewski)*, 246 B.R. 202, 214 (Bankr. E.D. Pa. 2000); *Reyes v. FCC Nat'l Bank (In re Reyes)*, 238 B.R. 507, 512 (Bankr. D.R.I. 1999); *Holcomb v. Norwest Fin., Inc. (In re Holcomb)*, 234 B.R. 79, 83 (Bankr. N.D. Ill. 1999).

Four have disagreed; of those, one has held that Section 524, but not Section 105, gives rise to a claim of relief by a debtor. *See Molloy v. Primus Auto. Fin. Serv.*, 247 B.R. 804, 818 n.12 & 819 (C.D. Cal. 2000). Three others have held that Section 524 supports a separate action for damages. *See Vogt v. Dynamic Recovery Serv. (In re Vogt)*, 257 B.R. 65, 69 (Bankr. D. Colo. 2000); *Malone v. Norwest Fin. Cal., Inc.*, 245 B.R. 389, 398 (E.D. Cal. 2000); *Rogers v. NationsCredit Fin. Serv. Corp.*, 233 B.R. 98, 109 (N.D. Cal. 1999).

Section 524 of the Code is enforceable in a separate damage action through Section 105. *Compare Pertuso*, 233 F.3d at 423 & n.1 *with Bessette*, App. 11-12. The United States Court of Appeals for the Seventh Circuit has also eschewed the *Bessette* court's use of Section 105 as a remedy for a violation of Section 524, holding instead that the remedy which Congress intended is the one expressly set forth in the statute, that is, unenforceability of the reaffirmation agreement and contempt in the bankruptcy court if the creditor has flouted the discharge. *Compare Bessette*, App. 12 (court may entertain action for damages for unfiled reaffirmation agreement) *with Cox*, 239 F.3d at 912, 916 (while unfiled reaffirmation agreement is unenforceable, claim for rescission properly dismissed where debtor paid the reaffirmed debt and kept the collateral; remedy for improper conduct in violation of the discharge is a contempt action under Section 524(a)(2)). By contrast, in *Bessette*, the Court of Appeals for the First Circuit ignored both the plain language and the legislative history of Section 524 as it tried to find a way to use Section 105 to create a new remedy outside of the express statutory mechanism enacted by Congress. App. 11-12.

Bankruptcy law is a creation of the Constitution and Congress. *See, e.g.*, U.S. Const. art. I, § 8, cl. 4; *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 192 (1902). Thus, when Congress makes bankruptcy law, it " 'says in a statute what it means and means in a statute what it says there.' " *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S. Ct. 1942, 1947 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241

(1989) (same). Where the language of a bankruptcy statute is plain, the proper role of a court is to enforce the statute as written. *Hartford*, 120 S. Ct. at 1947 (quoting *Ron Pair*, 489 U.S. at 241). Nothing in the plain language or the legislative history of Section 524 suggests that Congress intended to create a separate cause of action to enforce compliance with Section 524(c). *See Cox*, 239 F.3d at 916 (calling debtor's claim "hokey"); *Pertuso*, 233 F.3d at 421-23; *Peterson*, 2000 WL 1225788, at *4; *Pereira*, 223 B.R. at 30.

Far from creating a right of action for damages, Section 524(c) simply states that a reaffirmation agreement "is enforceable . . . only if" the requirements of that section have been satisfied. *See Cox*, 239 F.3d at 912; *Pertuso*, 233 F.3d at 421; *Pereira*, 223 B.R. at 30. In other words, when Congress considered the possibility that its requirements concerning reaffirmation agreements might be disregarded, Congress provided that the failure to comply with Section 524(c) renders the reaffirmation agreement unenforceable by either debtor or creditor. If the reaffirmation is unenforceable and the creditor nevertheless takes actions to collect the discharged debt, in violation of the discharge injunction established by Section 524(a)(2), the Code is equally clear that the remedy is contempt under Section 105. *See, e.g., Cox*, 239 F.3d at 914-17 ("If a statute declaring a type of contract unenforceable does anything, it creates a defense to a suit to enforce such a contract. . . . "); *Chase Auto. Fin., Inc. v. Kinion (In re Kinion)*, 207 F.3d 751, 756 (5th Cir. 2000) (twice flawed reaffirmation agreement was unenforceable); *In re Jackson*, 49 B.R. 298, 302 (Bankr. D. Kan. 1985)

("The sanction for failure to comply with the requirements of § 524(c) and (d) is unenforceability of the reaffirmation agreement."); *see also Kalb v. Feuerstein*, 308 U.S. 433, 438-40 (1940) (state court judgment procured in violation of the automatic stay held to be unenforceable). Reasonable minds may disagree with the decision of Congress and may think that a more severe sanction might have been preferable, but it cannot be denied that Congress did what it did – and did so in unmistakably plain language.

Ordinarily, the presence of such express statutory language should be enough to end the analysis. *Patterson v. Shumate*, 504 U.S. 753, 761 (1992); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Ron Pair*, 489 U.S. at 240-41. In this case, however, the legislative history of Section 524 further undermines Bessette's claim that an unfiled reaffirmation agreement gives rise to a nationwide class action. *Cf. Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 446-47 (1999) (referring to legislative history).

Section 524 was enacted in 1978 along with Section 362 of the Code, 11 U.S.C. § 362 (automatic stay provision). Initially, neither section contained an express cause of action. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2570-72, 2592-93 (1978). Subsequently, however, both sections were substantially amended in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 352, 354, 363, 365, 371, 376 (1984) [hereinafter 1984 Act]; and it was the 1984 Act which expressly added a damages remedy for individual debtors in Section 362(h) for violations of the automatic stay. *Id.* § 304, 98 Stat. 352 (codified

at 11 U.S.C. § 362(h)). The 1984 Act also substantially amended the reaffirmation provisions of Section 524 by shifting decision-making for represented debtors from the court to debtor's counsel, but without adding a similar damages remedy. *See id.* § 308, 98 Stat. 354.

Thus, at the very time that Congress added an express statutory cause of action for damages for violation of Section 362, it also substantially amended Section 524 but opted not to add a cause of action for damages for violation of Section 524. The significance of the legislative history of these two sections is plain: Congress intended to create a right of action under Section 362 but not under Section 524. *Pertuso*, 233 F.3d at 422; *Bassett v. Am. Gen. Fin., Inc. (In re Bassett)*, 255 B.R. 747, 755 (9th Cir. B.A.P. 2000), *appeal docketed*, No. 01-35001 (9th Cir. Jan. 3, 2001); *Peterson*, 2000 WL 1225788, at *5; *see also Hartford*, 120 S. Ct. at 1947-48 (because Congress knows how to include language in the Code, the exclusion of that language in another provision reflects an intent to exclude); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522-23 (1984) (same); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same).

*Bessette* nevertheless holds "that § 524 is enforceable through § 105."[6] App. 10. This transformation of Section

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[6] In reaching this conclusion, *Bessette* relies on *Jove Eng'g, Inc. v. Internal Revenue Serv. (In re Jove Eng'g, Inc.)*, 92 F.3d 1539 (11th Cir. 1996), and *Williams*, 244 B.R. at 867-68. However, neither supports reliance on Section 105 as creating an implied right of action for damages because both involve contempt proceedings under Section 105. 92 F.3d at 1544; *Williams*, 244 B.R. at 867-68. The only case that supports *Bessette's*

105 flies in the face of its language and the many judicial pronouncements on its meaning. *See N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982). Section 105 is part of the Code and is limited by it. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988) (equitable powers in bankruptcy are limited). As the Court has stated, "Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law . . . , but are limited to what the Bankruptcy Code itself provides." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 120 S. Ct. 1951, 1957 (2000). This Court has emphasized that Section 105 is not some sort of free-wheeling, all-purpose writ allowing courts to redress perceived wrongs everywhere. *Bildisco*, 456 U.S. at 527; *see, e.g., Pertuso*, 233 F.3d at 423 & n.1 (declining to fashion extraordinary judicial relief on the basis of section 105(a)); *Holloway v. Household Auto. Fin. Corp.*, 227 B.R. 501, 505-06 (N.D. Ill. 1998) (same); *Costa v. Welch (In re Costa)*, 172 B.R. 954, 965 (Bankr. E.D. Cal. 1994) (same). It

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interpretation of the scope of Section 105 is *Malone* from the Eastern District of California. However, *Malone's* expansion of Section 105 into a substantive right to pursue a civil damage action has been soundly criticized by subsequent decisions in the same district. *See Walls*, 255 B.R. at 45 n.5 (disagreeing with *Malone*; Section 105 is not to be used for the purpose of creating private remedies not expressly or impliedly created in the Bankruptcy Code); *Peterson*, 2000 WL 1225788, at *5 (criticizing *Malone* for failure to recognize that it is the contempt power that should be used when a creditor has injured a debtor by violating the discharge); *see also Bassett*, 255 B.R. at 757 (Section 105 does not provide the basis for a private right of action); *Molloy*, 247 B.R. at 818 n.12 (disagreeing with *Malone*; Section 105 is not to be used to create private remedies).

cannot properly be used as a tool to create new substantive rights for the parties that are otherwise unavailable under the Code. *Pertuso*, 233 F.3d at 423; *Holloway*, 227 B.R. at 505; *Lenior v. GE Capital Corp. (In re Lenior)*, 231 B.R. 662, 673-674 (Bankr. N.D. Ill. 1999); *Pereira*, 223 B.R. at 31; *Smith v. Keycorp Mortgage, Inc.*, 151 B.R. 870, 876 (N.D. Ill. 1993).

The startling breadth of the *Bessette* court's interpretation of Section 105 conflicts with decisions in the Third, Fifth and the Eighth Circuits. *See, e.g., Gillman v. Cont'l Airlines (In re Cont'l Airlines)*, 203 F.3d 203, 211 (3d Cir. 2000) (district court's order releasing and permanently enjoining third party actions against non-debtors was legally insupportable as it attempted to create a right not available under the Code); *La. Pub. Serv. Comm'n v. Mabey (In re Cajun Elec. Power Coop.)*, 185 F.3d 446, 453 n.9 (5th Cir. 1999) (Section 105(a) does not "authorize the courts to create substantive rights otherwise unavailable under applicable law," quoting *Southmark Corp. v. Grosz (In re Southmark Corp.)*, 49 F.3d 1111, 1116 (5th Cir. 1995)); *Chiasson v. J. Louis Matherne & Assocs. (In re Oxford Mgmt.)*, 4 F.3d 1329, 1334 (5th Cir. 1993) (bankruptcy court erred in ordering commission fees held in an escrow account where no provision in the Code gave bankruptcy court authority to grant compensation of post-petition funds); *Bird v. Carl's Grocery Co. (In re NWFX, Inc.)*, 864 F.2d 593, 595 (8th Cir. 1989) (bankruptcy court erred in enlarging the right of setoff beyond that allowed by the Code); *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (Section 105(a) does not permit courts "to create substantive rights otherwise unavailable under applicable law.").

When read against this Court's interpretation of Section 105, it is clear that Section 105 cannot support Bessette's civil action for damages. First, and most importantly, there is no subject matter jurisdiction where Congress "has determined that there should be no private, federal cause of action for the violation. . . . " *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 817 (1986); *see also Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (no subject matter jurisdiction where no implied cause of action). Rather, federal courts are courts of limited jurisdiction, and that jurisdiction is particularly circumscribed in the area of bankruptcy. *Celotex*, 514 U.S. at 307. When Congress has spoken, it is not the role of the courts to create new rights in bankruptcy. *See Smith*, 151 B.R. at 876. The plain language of Section 524(a)(2) includes an express remedy: the discharge operates as an injunction against actions to collect discharged debt, with the remedy of contempt to address violations. *Cox*, 239 F.3d at 914. That should end the analysis. *Ron Pair*, 489 U.S. at 241.[7] Otherwise, to allow a cause of action after the debt has been paid and the debtor has kept the collateral is, to use the expression of Judge Posner, "hokey." *Cox*, 239 F.3d at 916.

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[7] By using Section 105 to create a new substantive right contrary to the decision of Congress, the *Bessette* court ignored this Court's admonishment that "[t]he judiciary may not, in the face of . . . comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *E.g., Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97 (1981). In the First Circuit after *Bessette*, a litigant alleging a violation of the Code need only invoke Section 105 regardless of how Congress has legislated with respect to remedies.

The *Bessette* court disregards the issue of subject matter jurisdiction in holding that a plaintiff may bring a damage action for any alleged discharge violation in any federal court where the creditor may be served. App. 11-12. By expanding the subject matter jurisdiction of the District Court to embrace damage actions not contemplated by Congress, the *Bessette* court ignored the rule that "[s]anctions for violation of an injunction . . . are generally administered by the court that issued the injunction." *Baker v. Gen'l Motors Corp.*, 522 U.S. 222, 236 (1998); *see also Celotex*, 514 U.S. at 313 ("orderly process of law" requires proceeding in the bankruptcy court that issued the order). The *Cox* court, by contrast, correctly recognized that a discharge is enforceable only in the bankruptcy court that issued it. *See Cox*, 239 F.3d at 916.

*Bessette* is also wrong because Section 105 itself does not afford a new remedy. " 'The provisions of this title' simply denote a set of remedies fixed by Congress. A court cannot legislate to add to them." *Pertuso*, 233 F.3d at 423 (quoting *Kelvin v. Avon Printing Co.*, No. 94-1999, 1995 WL 734481 (6th Cir. Dec. 11, 1995)) (quotes in original); *see also Walls*, 255 B.R. at 45 n.5. *Cf. Carlisle*, 517 U.S. at 429 (court cannot supplement the Rules of Criminal Procedure under the All Writs Act).

Damages, as demanded by Bessette, App. 115, are particularly inappropriate. A writ may not grant relief "of a different kind" or "on a different principle" from that accorded by the underlying judgment. *Root v. Woolworth*, 150 U.S. 401, 411-12 (1893). In Section 524(a)(2), Congress expressly spoke in terms of an injunction. *See Cox*, 239 F.3d at 914; *Pertuso*, 233 F.3d at 421. Section 105 does not create an implied right of action for damages arising from

any alleged violation of Section 524 because that is not what Congress intended.[8]

Another stark discrepancy between the approach in the First Circuit and that in the Sixth and Seventh is the view of each court of the heinousness of the virtually identical conduct of the three creditors.[9] While *Bessette* condemns Avco as having engaged in wrongful conduct, App. 2, the Sixth Circuit finds the conduct of Ford Motor Credit Company "not contrary to what a reasonable person would consider to be fair," *Pertuso*, 233 F.3d at 423 (quoting *In re Briggs*, 143 B.R. 438, 453 (E.D. Mich. 1992)), while the Seventh Circuit calls a case challenging the conduct of Zale "both a frivolous suit and a nuisance suit." *Cox*, 239 F.3d at 916. Thus, even if there were subject matter jurisdiction and the reference in Section 105 to "provisions of this title" extends beyond the "set of remedies fixed by Congress," *Cox* and *Pertuso* agree that damages are neither "necessary" nor "appropriate" to remedy a violation of Section 524 where the debtor is represented by counsel, has already paid the reaffirmed debt and has kept the collateral. *See Cox*, 239 F.3d at 915;

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[8] In the absence of explicit revision, the Code generally incorporates precode practice. *Raleigh*, 120 S. Ct. at 1956. There was no damage remedy for violation of the discharge prior to adoption of the Code. The discharge merely was a defense available to the debtor in a post-discharge suit by the creditor. *Kessler v. Dep't of Pub. Safety*, 369 U.S. 153, 170 (1962).

[9] Each dealt with a debtor represented by counsel who executed a declaration on the reaffirmation agreement to the effect that the decision to reaffirm had been made with advice of counsel and was voluntary, each permitted the debtor to retain collateral, and each debtor paid the reaffirmed amount in full. *See supra* n.1.

*DuBois*, slip op. at 6. *Cf. Clinton*, 526 U.S. at 537 (discussing analogous issue under the All Writs Act).

In condemning Avco's alleged conduct as plainly "wrongful," App. 2, the *Bessette* court ignored the crucial facts that, prior to commencing suit, Bessette had the assistance of her attorney who executed the declaration on the unfiled reaffirmation averring that her agreement to pay was voluntary and informed, she had paid the debt in full, and that she kept the bedroom furniture. App. 94-96, 124-25 (Ex. B). The *Bessette* court also seemed unaware that Section 524(f) expressly permits debtors to make, and creditors to accept, voluntary payments. *See In re Hellums*, 772 F.2d 379, 381 (7th Cir. 1985) (per curiam) (debtor may use post-petition income to pay pre-petition debt). Once the debtor voluntarily has paid the debt, the creditor has no security interest. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992). Thus, after Bessette paid her debt, there was nothing "necessary or appropriate" left for any court to protect. *See Cox*, 239 F.3d at 915; *Kinion*, 207 F.3d at 756.[10] In other words, Bessette need no longer fear an in rem action and can retain her bedroom furniture.

The *Cox* court derided claims like that of Bessette as "hokey" because the debtor had paid the reaffirmed debt in full and kept the collateral. *Cox*, 239 F.3d at 916. Cox kept her ring; the Pertusos kept their van; and Bessette kept her bedroom furniture. All paid their reaffirmed

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[10] Civil contempt exists either to coerce a party into compliance with a court order or to compensate a complainant. *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 829 (1994). It is inappropriate when there is nothing to coerce, and the debtor has suffered no loss. *See Cox*, 239 F.3d at 916.

debt. Why, then, does only Bessette have a cause of action? Why do the neighbors of the Pertusos in Michigan and Cox in Illinois potentially have causes of action against Avco in Rhode Island? In the wake of *Bessette*, there will be a flurry of class actions filed in the First Circuit by debtors seeking to choose a forum outside of the bankruptcy court unrestricted by the structure created by Congress in the Code, a forum more amenable to the class actions that Judge Posner condemned as nuisance and frivolous; indeed, the flurry has begun. *See supra* at 10-11.

It is respectfully submitted that this Court should resolve these intercircuit inconsistencies before the application of *Bessette* to nationwide class actions makes it by default the law of the land.

## CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM P. ROBINSON III
*Counsel of Record*
PATRICIA A. SULLIVAN
JON M. ANDERSON
EDWARDS & ANGELL, LLP
2800 Financial Plaza
Providence, RI 02903
(401) 274-9200 (Main No.)
(401) 276-6611 (Fax No.)

MARY GRACE DIEHL
A. WILLIAM LOEFFLER
TROUTMAN SANDERS LLP
Bank of America Plaza
600 Peachtree Street N.E./Suite 6200
Atlanta, GA 30308-2216
(404) 885-3000 (Main No.)
(404) 885-3990 (Fax No.)
*Attorneys for Petitioners*

**United States Court of Appeals**
**For the First Circuit**

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No. 99-2291

CHERYL BESSETTE, FOR HERSELF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff, Appellant,

v.

AVCO FINANCIAL SERVICES, INC.; AVCO FINANCIAL SERVICES OF RHODE ISLAND, INC.; AVCO FINANCIAL SERVICES OF COLORADO, INC.; AVCO FINANCIAL SERVICES MANAGEMENT CO.,

Defendants, Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND
[Hon. Ronald R. Lageaux, *U.S. District Judge*]

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Before
Torruella, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
and Schwarzer,* *Senior District Judge*.

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*Cathleen M. Combs*, with whom *Daniel A. Edelman, Tara L. Goodwin, Edelman, Combs & Latturner, Christopher M. Lefebvre* and *Law Offices of Claude Lefebvre & Sons* were on brief, for appellant.

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* Of the Northern District of California, sitting by designation.

*Gary Klein, John Rao* and *National Consumer Law Center* on brief, for National Association of Consumer Bankruptcy Attorneys, amicus curiae.

*Patricia A. Sullivan,* with whom *William P. Robinson III, Jon M. Anderson, Edwards & Angell, LLP, Mary Grace Diehl, A. William Loeffler* and *Troutman Sanders LLP* were on brief, for appellees.

*Robert E. McKew, George J. Wallace, Timi Nickerson Kenealy* and *Eckert Seamans Cherin & Mellott, LLC* on brief, for American Financial Services Association, amicus curiae.

*Michael E. Malamut* on brief, for New England Legal Foundation, amicus curiae.

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October 27, 2000

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**TORRUELLA, Chief Judge**. This appeal involves the wrongful, and supposedly common, practice by certain creditors of coercing naive and inexperienced debtors into reaffirming debt that has been properly discharged in bankruptcy. Such a practice contravenes one of the primary purposes of federal bankruptcy law, that is, to "give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.' " *Lines v. Frederick,* 400 U.S. 18, 19, (1971) (quoting *Local Loan Co. v. Hunt,* 292 U.S. 234, 244-45, (1934)). Nationwide, debtors have sought relief from both the federal bankruptcy courts and district courts attempting to put an end to this practice. The latest strategy for reform is to seek certification of a

class of debtors against repeat offenders of the Bankruptcy Code that is, creditors who as a matter of business practice procure improper reaffirmation agreements.

This action brings the trend to the attention of the First Circuit. Specifically at issue in this case is the alleged misconduct of the appellee, Avco Financial Services,[1] in securing the reaffirmation agreement of the appellant's pre-petition debt that had been successfully discharged in bankruptcy. The appellant, Cheryl A. Bessette,[2] fashioned a Complaint seeking relief under the Bankruptcy Code, 11 U.S.C. §§ 105, 362, 524, the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, 1962, and state law, and she moved to certify a class of similarly situated debtors.

The district court properly found the appellant's RICO and state law claims untenable. However, operating under a misunderstanding that it was powerless to provide a remedy to the appellant under the Bankruptcy Code, the district court also dismissed the bankruptcy claims in their entirety. *See Bessette v. Avco Fin. Servs., Inc.*,

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[1] The defendants-appellees (collectively "Avco") are Avco Financial Services, Inc. ("AFS"), Avco Financial Services Management Co. ("Avco-Management"), Avco Financial Services of Rhode Island, Inc. ("AFS-RI"), Avco Financial Services of Colorado ("AFS-CO"), and John Does 1-10. AFS changed its name to Textron Funding Corporation on January 7, 1999. Textron Funding is a wholly-owned subsidiary of Textron, Inc.

[2] Bessette filed her Complaint on August 25, 1997. The district court subsequently permitted Bessette to amend her Complaint to add an additional plaintiff, Francisco Gonzalez. Gonzalez is not part of this appeal.

240 B.R. 147 (D.R.I. 1999). Because we have determined that a remedy was available through the court's equitable powers under § 105 of the Code, we reverse in part, and remand for proceedings consistent with this opinion.

## BACKGROUND

### I. Bankruptcy Proceedings

Bessette filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the federal bankruptcy court in Rhode Island. Her debt included sums due to Avco. The bankruptcy court entered orders discharging the appellant's debt, including the Avco obligation. However, prior to the discharge of her debt by the bankruptcy court, the appellant executed a reaffirmation agreement with Avco. The reaffirmation agreement was not filed with the bankruptcy court and did not satisfy other general requirements of 11 U.S.C. § 524, the statutory section that authorizes voluntary reaffirmation agreements.

### II. District Court Proceedings

Bessette subsequently brought this action in the United States District Court for the district of Rhode Island seeking damages for alleged violations of the automatic stay and discharge injunction provided by §§ 362 and 524 of the Bankruptcy Code, respectively. The appellant's primary theory was that § 524 provides a private right of action. Alternatively, she contended that the district court is authorized to grant relief via 11 U.S.C. § 105(a), which provides in relevant part: "The court may

issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Bessette also brought a state law claim for unjust enrichment. She later amended her Complaint to allege that the appellee used the mails to obtain revenues from reaffirmation agreements in violation of RICO. Avco then moved to dismiss the Second Amended Complaint.

The district court's decision to grant the motion to dismiss is the subject of the instant appeal.[3] First, the district court concluded that the alleged facts, if true, did not support a violation of § 362.[4] The court next held that § 524 did not provide the appellant with a private right of action. The court then narrowly construed its powers under § 105 and determined that it could not provide any form of relief. The court also concluded that the state law claim was preempted by the Bankruptcy Code. Finally, the court dismissed the RICO claim because the facts as

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[3] The appellant does not appeal the dismissal of Count III of the Complaint, the violation of the automatic stay provision of the Code, and Count V of the Complaint, one of the three RICO charges.

[4] On a related matter, the appellee moved to strike from the appellate record the "Affidavit of Cheryl Bessette" appended as Exhibit A to the appellant's brief. For the most part, the affidavit relates to allegations in support of Count III, which is not part of this appeal. That said, the affidavit was properly before the district court because it was attached to the appellant's opposition to the motion to dismiss. Furthermore, the district court considered the affidavit in reaching its decision to dismiss Count III and grant the appellant leave to amend the claim under § 362(a). *See Bessette*, 240 B.R. at 158. The motion to strike is denied.

alleged failed to support the existence of a person separate from the enterprise in order to satisfy the elements of the statute.

## DISCUSSION

We review the grant of a motion to dismiss de novo, applying the same criteria as the district court. *See LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 509 (1st Cir. 1998); *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank*, 958 F.2d 15, 17 (1st Cir. 1992). Accordingly, we accept the facts alleged in the Complaint as true, drawing all reasonable inferences in favor of the appellant. *See Garita*, 958 F.2d at 17. The Court may affirm the dismissal for failure to state a claim only if, under the facts alleged, " 'the plaintiff cannot recover on any viable theory.' " *Id.* (quoting *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990)). Although the pleadings should generally be construed liberally, *see Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1171 (1st Cir. 1995), a greater level of specificity is required in RICO cases, *see Garita*, 958 F.2d at 17 & n. 1 (citing *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)).

### I. *Availability of Relief Under the Bankruptcy Code*

The effect of a discharge in bankruptcy is explained in 11 U.S.C. § 524. Generally, a discharge in bankruptcy relieves a debtor from all pre-petition debt, and § 524(a) permanently enjoins creditor actions to collect discharged debts. *See National Ins. Co. of North America v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re*

*National Gypsum Co.*), 118 F.3d 1056, 1062 n. 13 (5th Cir. 1997); *Hardy v. United States* (*In re Hardy* ), 97 F.3d 1384, 1388-89 (11th Cir. 1996); *In re Getzoff*, 180 B.R. 572, 573 (B.A.P. 9th Cir. 1995). The debtor may, however, voluntarily enter into an enforceable agreement with a creditor to reaffirm an otherwise dischargeable debt. *See* § 524(c); *see also In re Getzoff*, 180 B.R. at 574. A reaffirmation agreement is only binding if made in compliance with the specific conditions set forth in § 524. *See In re Getzoff*, 180 B.R. at 574. For example, § 524 requires that the reaffirmation agreement be filed with the bankruptcy court and that it advise the debtor that the agreement may be rescinded within sixty days of the date of filing with the court. *See* § 524(c).

There is no dispute that the reaffirmation agreement involved in this case falls short of the § 524 criteria. However, § 524 is silent on the ramifications of that failing, and consequently the issue presented in this case is the proper remedy for a violation of § 524.

The appellant proposes that § 524 provides an implied right of action against Avco. She argues that a reaffirmation agreement that does not comply with § 524 is void and unenforceable and that, therefore, she is entitled to restitution. The appellee, however, disputes the existence of an implied right of action based upon the four-factor analysis used to determine Congress's intent, set out by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The appellee proffers instead that the proper remedy for a § 524 violation is contempt.

Whether there exists a private right of action for damages or sanctions under § 524 is a question of first impression in the First Circuit. Courts that have considered this question are divided. *Compare Malone v. Norwest Fin. California, Inc.*, 245 B.R. 389, 395-98 (E.D. Cal. 2000) (finding an implied right of action); *Molloy v. Primus Automotive Fin. Servs.*, 247 B.R. 804, 819-20 (Bankr. C.D. Cal. 2000) (same), *with Transamerica Fin. Servs. v. Danney*, No. 99-228- P-H, 1999 WL 33117201, *3 (D. Me. Dec. 23, 1999) (recommendation of magistrate judge affirmed by the district court) (relying on the district court's opinion in *Bessette* ); *Cox v. Zale Delaware, Inc.*, No. 97 C 4464, 1998 WL 397841, at *2-*4 (N.D. Ill. July 13, 1998); *Pereira v. First North Am. Nat'l Bank*, 223 B.R. 28, 30 (N.D. Ga. 1998); *Lenior v. GE Capital Corp.* (*In re Lenior* ), 231 B.R. 662, 673-74 (Bankr. N.D. Ill. 1999) (holding that § 524 does not create a private right of action). We see no reason to jump into the fray with the complex analysis required by *Cort v. Ash* when a remedy is readily and expressly available through another section of the Bankruptcy Code, namely, § 105(a).

As this Court has previously recognized, "[s]ection 105(a) empowers the bankruptcy court to exercise its equitable powers – where 'necessary' or 'appropriate' – to facilitate the implementation of other Bankruptcy Code provisions." *Noonan v. Secretary of Health & Human Servs.* (*In re Ludlow Hosp. Soc'y, Inc.*), 124 F.3d 22, 27 (1st Cir. 1997); *see also SPM Mfg. Corp. v. Stern* (*In re SPM Mfg. Corp.*), 984 F.2d 1305, 1311 (1st Cir. 1993); *In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir. 1991). While it is true that the considerable discretion conferred on courts sitting in bankruptcy by § 105 is not unlimited, in that it is

not " 'a roving commission to do equity,' " *Noonan*, 124 F.3d at 27 (quoting *Chiasson v. J. Louis Matherne & Assocs.*, 4 F.3d 1329, 1334 (5th Cir. 1993)), a court is well within its authority if it exercises its equitable powers to enforce a specific code provision, *see id.; SPM MFG.*, 984 F.2d at 1311, such as § 524. Thus, § 105 does not itself create a private right of action, but a court may invoke § 105(a) "if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code," *Noonan*, 124 F.3d at 28, so long as the court acts consistent with the Code and does not alter the Code's distribution of other substantive rights, *see id.; SPM Mfg.*, 984 F.2d at 1311.

It follows, therefore, and the parties agree, that § 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have. *See In re Hardy*, 97 F.3d at 1389; *In re Elias*, 98 B.R. 332, 337 (N.D. Ill. 1989); *Cherry, III v. Arendall* (*In re Cherry, III* ), 247 B.R. 176, 186-87 (Bankr. E.D. Va. 2000); *Matthews v. United States* (*In re Matthews*), 184 B.R. 594, 598 (Bankr. S.D. Ala. 1995). Those contempt powers inherently include the ability to sanction a party. *See In re Hardy*, 97 F.3d at 1389-90 (recognizing that courts' statutory contempt powers must include the award of monetary and other forms of relief "to the extent such awards are necessary and appropriate to carry out the provisions of the Bankruptcy Code"); *Cherry*, 247 B.R. at 187 ("The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief.").

Against this background it is clear, as the appellee conceded at oral argument, that a bankruptcy court is

authorized to invoke § 105 to enforce the discharge injunction imposed by § 524 and order damages for the appellant in this case if the merits so require. Consistent with this determination, bankruptcy courts across the country have appropriately used their statutory contempt power to order monetary relief, in the form of actual damages, attorney fees, and punitive damages, when creditors have engaged in conduct that violates § 524. *See, e.g., In re Hardy,* 97 F.3d at 1389- 90; *In re Elias,* 98 B.R. at 337; *Cherry,* 247 B.R. at 191; *In re Arnold,* 206 B.R. 560, 568 (Bankr. N.D. Ala. 1997); *Wiley v. Mason (In re Wiley* ), 224 B.R. 58, 66 (Bankr. N.D. Ill. 1998) (denying motion to dismiss), *vacated on other grounds,* 237 B.R. 677 (Bankr. N.D. Ill. 1999) (finding class representative inadequate because she suffered no injury); *Matthews,* 184 B.R. at 599-601; *In re Bowling,* 116 B.R. 659, 664-65 (Bankr. S.D. Ind. 1990); *cf. In re Rosteck,* 899 F.2d 694, 697 (7th Cir. 1990) (affirming sanction for violation of § 524 without reference to § 105 contempt powers). Therefore, we hold that § 524 is enforceable through § 105. *See Malone,* 245 B.R. at 395.

Nevertheless, the appellee suggests that this Court should affirm the district court's dismissal of the bankruptcy claims, challenging whether the district court has the authority to sanction the appellee for contempt of an order of the bankruptcy court. The appellee maintains, and the district court opined below, that appellant must bring a contempt proceeding before the bankruptcy court. The district court held that it "would be unable to fashion relief for all the named plaintiffs, because 'sanctions for violations of an injunction, in any event, are generally

administered by the court that issued the injunction.'" *Bessette* 240 B.R. at 156 (citations omitted).

While this theory is certainly not without support, *see, e.g., Transamerica Fin. Servs.*, 1999 WL 2003457, at *3; *Cox*, 1998 WL 397841, at *3-*4 (dismissing claims without prejudice to be brought in bankruptcy court); *Pereira*, 223 B.R. at 31 ("[T]he court whose order has been defied must entertain the contempt action."), we believe that the contrary authority is more persuasive when dealing, as here, with violation of a purely statutory order. *See, e.g., Jove Eng'g, Inc. v. IRS* (*In re Jove Eng'g, Inc.*), 92 F.3d 1539, 1555 (11th Cir. 1996) (recognizing district court's authority to dispose of contempt action for violation of automatic stay); *Malone*, 245 B.R. at 393 (ordering the case withdrawn from bankruptcy for district court to enforce § 524 through its § 105(a) powers); *Williams v. Sears, Roebuck & Co.* (*In re Williams* ), 244 B.R. 858, 867-68 (S.D. Ga. 2000) (retaining jurisdiction over contempt claims so long as discharge injunction was issued within the same district court). Appellant seeks enforcement of the statutory injunction set forth in § 524, not one individually crafted by the bankruptcy judge, in which that judge's insights and thought processes may be of particular significance. Thus, few of the practical reasons for confining contempt proceedings to the issuing tribunal apply here.

As a district court sitting in bankruptcy is similarly authorized to invoke its equitable powers under § 105 when necessary to carry out the provisions of the Bankruptcy Code, *see Jove Eng'g*, 92 F.3d at 1554; *Green v. Drexler* (*In re Feit & Drexler, Inc.*), 760 F.2d 406, 414-15 (2d Cir. 1985); *Malone*, 245 B.R. at 394, we reverse the district court's holding that appellant could only bring her claims

in the court that issued the original discharge order and remand for the district court's consideration of enforcement of § 524 through § 105. *See Williams*, 244 B.R. at 867-68. If the district court determines that it is appropriate to refer the matter back to the bankruptcy court under 28 U.S.C. § 157 and the Rhode Island standing order, *see McGlynn v. Credit Store, Inc.*, 234 B.R. 576, 583-84 (D.R.I. 1999), the bankruptcy court can accordingly resolve appellant's claims.

In favor of district court retention, appellant points out that she seeks class certification and relief, and urges the importance and desirability of this type of broad remedy. *See Williams*, 244 B.R. at 862 (class-based relief may be the "perfect" remedy in situations like this). However, should the district court refer the case to the bankruptcy court, appellant's ability to pursue her class action remains. Not only does the bankruptcy court have the power to utilize § 105 in enforcing § 524, it is also empowered to maintain class actions and may be able to provide much the same kind of relief, in appropriate situations, as the district court itself. See Fed. R. Bankr.P. 7023 (importing Fed.R.Civ.P. 23 into "adversary proceedings"). In any event, we venture no opinion as to the suitability of class certification in these circumstances, and the decision of whether to retain jurisdiction or refer the parties to the bankruptcy court rests with the district court on remand.

The appellee's remaining contentions are unavailing and merit little discussion. Despite the appellee's suggestion to the contrary, under a generous reading of the Complaint, the appellant's allegations of violations of § 362 and § 524 and requests for appropriate relief were

sufficient to put the appellee on notice of the grounds for the complaint, and that is the proper focus of our review. *See Rodriguez*, 57 F.3d at 1171. Although the possibility of relief for the alleged violations through § 105 was not specifically plead in the form of a motion for contempt, "[i]t is not fatal to a complaint that a legal theory has been mischaracterized or that the precise language invoking jurisdiction has not been used." *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224, 226-27 (1st Cir. 1990) (citing *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981) and 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1206, at 76-77 (1969)). Moreover, both parties briefed the issue of relief under § 105 before this Court and below. Thus, the appellee will not be unduly prejudiced. *See In re Hardy*, 97 F.3d at 1388.

We also disagree with the appellee that the district court addressed the merits of the appellant's claim under § 105. As discussed above, the district court disregarded the possibility of relief under its statutory contempt power based on its view that a remedy was only available from the court that issued the original injunction. *See Bessette*, 240 B.R. at 155. Moreover, it is apparent that the court misconstrued the scope of its § 105 equitable powers, and as a result, it failed to recognize that the remedy requested by the appellant was available in the district court.

On remand the district court can proceed with the action under § 105 or refer to the case to the bankruptcy court to reopen the bankruptcy proceeding, *see In re Wiley*, 224 B.R. at 63, in which case the bankruptcy court can then consider the merits of class certification or consider appropriate individual relief. *See, e.g., id.* at 65-66,

82 (approving the certification of class actions under § 105 for systemic violations of the Bankruptcy Code). Accordingly, we vacate the district court's judgment on counts I and II of the Complaint and remand for proceedings consistent with this opinion.

II. *Availability of Relief Under State Law*

The district court determined that state law remedies for unjust enrichment were preempted by congressional intent evidenced in the comprehensive remedial scheme of the Bankruptcy Code. *See Bessette*, 240 B.R. at 163. Although we disagree with the district court's analysis of the remedies available under the Bankruptcy Code, we concur with its conclusion that the appellant's state law claim for unjust enrichment for collecting debt under an improper reaffirmation agreement is preempted. Because we concluded above that § 105 of the Code authorizes federal courts to order damages for violations of § 524 when necessary – i.e., disgorgement of unjust profit – an alternative state court remedy for unjust enrichment in these circumstances is inevitably in conflict with Congress's plan that federal courts enforce § 524 through § 105.

In a case such as this, where there is no explicit statutory language preempting state law, this Court will find implied preemption under one of two circumstances: (1) where the federal statutory scheme is so pervasive that Congress clearly intended to "occupy the field" to the exclusion of state law, or (2) where a particular state law is in direct conflict with the federal law to an extent that the statutes cannot coexist. *See Summit Inv. & Dev.*

*Corp., v. Leroux*, 69 F.3d 608, 610 (1st Cir. 1995); *see also MSR Exploration Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913 (9th Cir. 1996) (quoting *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982)). In reaching our conclusion that a state law claim for unjust enrichment is preempted, we rely on the existence of the first condition.

In *Patriot Portfolio, LLC v. Weinstein* (*In re Weinstein* ), we observed that: "[s]tates may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." 164 F.3d 677, 682-83 (1st Cir. 1999) (quoting *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265 (1929)), *cert. denied sub nom. Patriot Portfolio, LLC v. Weinstein*, 527 U.S. 1036 (1999). The district court correctly noted that the broad enforcement power under the Bankruptcy Code preempts virtually all alternative mechanisms for remedying violations of the Code. *See Bessette*, 240 B.R. at 163. Other courts that have been faced with a state unjust enrichment claim have held that Congress's intent in enacting the remedial provisions of the Bankruptcy Code leaves "no room for the state cause of action." *Cox v. Zale Del., Inc.*, 242 B.R. 444, 450 (N.D. Ill. 1999). *See also Pereira v. First N. Am. Nat'l Bank*, 223 B.R. 28, 31-32 (N.D. Ga. 1998); *Reyes v. FCC Nat'l Bank* (*In re Reyes* ), 238 B.R. 507, 513 (Bankr. D.R.I. 1999).

In contrast, in *Vahlsing v. Commercial Union Insurance Co.*, 928 F.2d 486 (1st Cir. 1991), a panel of this Court permitted a state law cause of action for violation of the § 362 automatic stay to go forward. However, in that case the state law tort claims arose because the creditor, unaware of the bankruptcy proceeding, had the debtor arrested for contempt. There was no comparable overlap

between a specific remedy available under the Bankruptcy Code and the state law remedies for false imprisonment, negligence, abuse of process.[5] Similarly, we find the appellant's reliance on *Sears, Roebuck & Co. v. O'Brien*, 178 F.3d 962 (8th Cir. 1999), and *Greenwood Trust Co. v. Smith*, 212 B.R. 599 (BAP 8th Cir. 1997), misplaced because again there was no overlap between the Code and the state laws at issue in those cases; the Iowa state laws that regulated contact between clients and lawyers did not impede or interfere with the applicable provisions of the Bankruptcy Code. Therefore, we agree with the district court that the state law cause of action for unjust enrichment is preempted by the Bankruptcy Code.

## III. *Availability of Relief Under RICO*

We turn to the appellant's final theory for relief, RICO. The district court assumed that the appellant, in Counts IV, V, and VI of her Complaint, was alleging violations under 18 U.S.C. § 1962(c), and the appellant has not contested that characterization of her claims. Proceeding with the same understanding, we can quickly dispose of the appellant's RICO claims.

### A. *Section 1962(c)*

Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any

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[5] Furthermore, it is not apparent whether the issue of federal preemption was directly before the court.

> enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

For the appellant's § 1962(c) claim to survive the appellee's motion to dismiss, the Amended Complaint needed to allege: "(1) conduct, (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 189 (1st Cir. 1996) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)). Additionally, it is well settled in this circuit that the "person" identified under § 1962(c) must be distinct from the "enterprise." *See id.* at 190-91; *Miranda*, 948 F.2d at 44 ("[T]he same entity cannot do double duty as both the RICO defendant and the RICO enterprise."). Similarly, an "enterprise" may not be held directly, or indirectly, liable for the conduct of the "person." *See Miranda*, 948 F.2d at 45 (citing *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-34 (1st Cir. 1986)); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988). Because the defendant and the enterprise must be distinct, the appellant's RICO claims must fail.

The district court concluded that the appellant failed to plead sufficiently the existence of an enterprise distinct from the RICO person and dismissed all three counts of the appellant's RICO claim for failure to state a claim upon which relief could be granted. The appellant does not appeal the dismissal of Count V. We deal with the remaining two counts in turn.

**B.** ***Count IV***

In Count IV of the Complaint, the appellant alleges that AFS Management is the person defined in 18 U.S.C. § 1961 and that Textron is the "enterprise" as defined in § 1961(4). She further alleges that Textron delegated to AFS Management the conduct of certain aspects of its business, the profits of which went to Textron. And finally, she alleges that AFS Management conducted the delegated business activities through repeated acts of mail fraud. The district court held that because AFS Management is a subsidiary of Textron, they are the same entity and that, therefore, AFS Management cannot be the "person" under RICO as the appellant alleges. *See Bessette*, 240 B.R. at 160-61.

This circuit has consistently refrained from adopting a bright line rule that a subsidiary can never be distinct from its parent corporation, *see Deane v. Weyerhaeuser Mortgage Co.*, 967 F.Supp. 30, 34 (D. Mass. 1997) (analyzing First Circuit law), and despite appellant's arduous arguments in favor of such a rule, we are not persuaded to do so today. Rather, we will continue to look to the allegations in the complaint to determine whether the parent's activities are sufficiently distinct from those of the subsidiary at the time that the alleged RICO violations occurred. *See id.; see, e.g., Compagnie De Reassurance D'Ile De France v. New England Reinsurance Corp.*, 57 F.3d 56, 92 (1st Cir. 1995) (reviewing evidence that supported finding that parent and subsidiary were not distinct for § 1962(c) purposes).

Consequently, we agree with the district court that the assertion that AFS Management is a person distinct from the enterprise is insufficient, and the failure to allege that AFS Management took actions independent of Textron is fatal to the appellant's claims. *See Brannon v. Boatmen's First Nat'l Bank of Oklahoma*, 153 F.3d 1144, 1147-48 (10th Cir. 1998); *Compagnie*, 57 F.3d at 92. In most cases, a subsidiary that is under the complete control of the parent company is nothing more than a division of the one entity. Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement. *See, e.g., Arzuaga-Collazo v. Oriental Fed. Sav. Bank*, 913 F.2d 5, 6 (1st Cir. 1990); *see also Emery v. American Gen. Fin., Inc.*, 134 F.3d 1321, 1324-25 (7th Cir.) (explaining that it would be a different situation if criminals took over a subsidiary and wrested control of the parent and used the parent as an instrument for further criminal activities), *cert. denied*, 525 U.S. 818 (1998). This position was advocated by the Seventh Circuit in *Emery v. American General Financial, Inc.*, 134 F.3d 1321, 1324-25 (7th Cir. 1998), and concisely expressed by the Tenth Circuit in *Brannon v. Boatmen's First National Bank of Oklahoma*, 153 F.3d 1144, 1148 (10th Cir. 1998): "[A]t a bare minimum, an allegation of RICO liability under 1962(c) must indicate how the defendant used the alleged enterprise to facilitate the fraudulent conduct." Otherwise, a subsidiary that simply conducts its affairs as delegated by the parent company for the profit of the parent company is engaged in nothing more than a legitimate corporate and financial relationship, *see id.; Deane*, 967 F.Supp. at 34, which is certainly not subject to RICO liability on that basis alone. As the Seventh

Circuit has explained, a scheme does not implicate RICO merely because it originated with someone connected to a corporation. *See Emery*, 134 F.3d at 1324-25. Accordingly, we agree with the dismissal of Count IV.

### C. *Count VI*

Count VI identifies John Does 1-10 as the "person" and AFS and Textron each as an "enterprise." Specifically, the appellant alleges that John Does, as AFS employees, conducted the business activities of the enterprises through mail fraud. The problem with this formulation of the claim is that employees acting solely in the interest of their employer, carrying on the regular affairs of the corporate enterprise, are not distinct from that enterprise. *See id.; Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994) ("[W]here employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation.").

The Complaint avers that the John Does were acting in the scope of their authority as employees of Avco and nothing more. The appellant does not allege that the John Does were associated in any manner apart from the activities of the enterprise, and therefore, under the heightened standard required for RICO claims, *see Garita*, 958 F.2d at 17 & n. 1, she fails to state a claim for which relief can be granted under RICO, *see Riverwoods*, 30 F.3d at 344 (discussing *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d

438, 440-42 (5th Cir. 1987) (per curiam)). Thus, Count VI was properly dismissed.

## CONCLUSION

Because the appellant sufficiently stated a claim for relief from a violation of § 524 under § 105 of the Bankruptcy Code, we **vacate** the dismissal of Counts I and II of the Complaint, and **remand** for proceedings consistent with this opinion. However, we **affirm** the district court's dismissal of the remaining counts of the Complaint for the reasons discussed above.

**United States Court of Appeals**
**For the First Circuit**

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No. 99-2291

CHERYL BESSETTE, FOR HERSELF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Plaintiff - Appellant

v.

AVCO FINANCIAL SERVICES, INC.; AVCO FINANCIAL SERVICES OF RHODE ISLAND, INC,; AVCO FINANCIAL SERVICES OF COLORADO, INC.; AVCO FINANCIAL SERVICES MANAGEMENT CO.
Defendants - Appellees

Order of Court

*Before*:

*Torruella*, Chief Justice;
*Campbell*, Senior Circuit Judge;
*Schwarzer*, District Court Judge*.

Entered: December 15, 2000

Defendants-appellees in the petition for rehearing contend, mistakenly, that "The Panel Decision will enable a debtor in a pending or closed bankruptcy case to bring a cause of action under Section 105(a) grounded upon a violation of Section 524 (or any other section of the Bankruptcy Code) in a federal district court in any jurisdiction in which the defendant may be subject to personal jurisdiction. . . . "

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* of the 9th Circuit sitting by designation

To avoid any possibility of misunderstanding, on page 13 of the slip opinion, at line 14, we revise the final sentence of the first paragraph to read as follows:

> "In any event, we venture no opinion as to the suitability of class certification in these circumstances, and the decision of whether the district court sitting in bankruptcy should retain jurisdiction or refer the parties to the bankruptcy court rests most appropriately with the district court on remand. See 28 U.S.C. § 157(d).

On page 14 of the slip opinion, we also strike lines 19 and 20 of the new paragraph and the first two words of line 21, and inser [sic] in place therof the following:

> "On remand the district court should determine initially whether, in spite of the District of Rhode Island's standing order adopted under 28 U.S.C. § 157(a) it wishes to, and may appropriately, retain jurisdiction under 28 U.S.C. § 157(d); and if the district court determines that retention is inappropriate, shall refer the entire case to the United States Bankruptcy Court for the District of Rhode Island, . . . " [continue with *"see In re Wiley,* etc."]

Other than making the textual changes referred to above, the panel denies defendants-appellees' petition for panel rehearing.

By The Court:

PHOEBE MORSE, CLERK

By:/s/ Janice M. O'Neil
Chief Deputy Clerk

cc: All Counsel of Record

# MANDATE

## UNITED STATES COURT OF APPEALS

## FOR THE FIRST CIRCUIT

No. 99-2291

CHERYL BESSETTE, FOR HERSELF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff-Appellant,

v.

AVCO FINANCIAL SERVICES, INC.; AVCO FINANCIAL SERVICES OF RHODE ISLAND, INC.; AVCO FINANCIAL SERVICES OF COLORADO, INC.; AVCO FINANCIAL SERVICES MANAGEMENT CO.,
Defendants-Appellees.

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## JUDGMENT

Entered: October 27, 2000

This cause came on to be heard on appeal from the United States District Court for the District of Rhode Island, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The dismissal of Counts I and II of the Complaint is vacated and the cause is remanded for further proceedings consistent with this opinion. The district court's dismissal of the remaining counts of the Complaint is affirmed for the reasons discussed in the opinion of this Court.

No costs.

By the Court:

Phoebe Morse, Clerk.

**By JANICE M. O'NEIL**
**Chief Deputy Clerk.**

Certified and Issued
as mandate under
Fed. R. App. P. 41 JAN 03 2001

_____
Clerk

/s/ Linda Barry
Deputy Clerk

[cc: Ms. Combs, Ms. Sullivan,
Messrs: Klein, McKew and Malamut]

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| CHERYL BESSETTE and FRANCISCO GONZALEZ, for themselves and on behalf of all others similarly situated, | ) | |
| Plaintiffs, | ) | C.A. No. 97-487L |
| v. | ) | |
| AVCO FINANCIAL SERVICES, INC., AVCO FINANCIAL SERVICES MANAGEMENT COMPANY, AVCO FINANCIAL SERVICES OF RHODE ISLAND, INC., AVCO FINANCIAL SERVICES OF COLORADO, INC., and JOHN DOES 1-10, | ) | |
| Defendants. | ) | |

OPINION AND ORDER

Ronald R. Lagueux, Chief Judge

In this as yet uncertified class action, plaintiffs seek monetary relief from defendants for alleged violations of the Bankruptcy Code and the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In addition, plaintiffs have alleged a state law claim for unjust enrichment.

Specifically, plaintiffs' Second Amended Complaint seeks damages for alleged violations of the automatic stay and discharge injunction provided for by the Bankruptcy Code because of defendants' improper method of securing reaffirmation agreements of plaintiffs' pre-petition debt. Plaintiffs Second Amended Complaint also

alleges that defendants used the mails to obtain revenues from the reaffirmation agreements thus violating RICO. In response, defendants have filed a motion to dismiss the seven Count Second Amended Complaint in its entirety. Although the alleged practices of defendants appear to abuse the carefully designed bankruptcy laws, this Court is unable to grant the relief sought by plaintiffs. For the reasons outlined below, this Court dismisses the complaint in its entirety. However, plaintiffs are granted leave to amend Count III only.

## I. Background

Plaintiff Cheryl Bessette resides in the District of Rhode Island. Francisco Gonzalez, the other named plaintiff, resides in California. Defendants are the various corporations which comprise the corporate group of Textron's finance division. Textron, although not a named defendant, is a global conglomerate holding company. The finance segment of Textron's business is delegated to AVCO Financial Services, Inc. ("AFS"), a wholly owned subsidiary of Textron, and its consumer finance subsidiaries (collectively "AVCO"). AFS conducts this consumer finance business through its various subsidiaries, including AVCO Financial Services of Rhode Island ("AFS-RI"), and AVCO Financial Services of Colorado, Inc. ("AFS-CO"). AVCO Financial Services Management ("AFS Management") is a wholly owned subsidiary of AFS which provides management services to AFS and its Unites [sic] States subsidiaries. Defendants John Does 1 through 10 are unidentified individuals employed by AFS and/or its subsidiaries in charge of securing reaffirmation agreements from debtors. Many of these separate corporations

within AVCO's corporate group share officers and directors.

On August 7, 1995, plaintiff Bessette and her husband filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the District of Rhode Island. *In re Bessette*, 95-11908 (Bankr.D.R.I.). One of Bessette's debt obligations was owed to AFS-RI for furniture that was bought on credit. On or about September 20, 1995, Bessette executed a reaffirmation agreement which was mailed to her by one of the defendants. This agreement was signed by both Bessette and her lawyer. The agreement purportedly required Bessette to pay $1500 plus interest in $100 monthly installments to "AVCO Financial Services" and be sent to an address in Colorado that belongs to AFS-CO. This agreement was never filed with the Bankruptcy Court for the District of Rhode Island as required by 11 U.S.C. § 524. In violation of § 524, the agreement states that if the debtor rescinds it, any payments made will be retained by the creditor. On or about November 2, 1995, the Bankruptcy Court issued a discharge order pursuant to 11 U.S.C. § 524, which relieved Bessette of all dischargeable debts including the AFS obligation. No payments were made to AFS by Bessette until May 1, 1996, after the discharge order was issued. *See* Second Amended Complaint, Exhibit C.

On November 13, 1996 plaintiff Francisco T. Gonzalez and his wife, Maria, filed a joint petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of California, Modesto Division. Gonzalez was not represented by counsel in that bankruptcy proceeding. In that bankruptcy case, Gonzalez listed an obligation to AFS of $411

for an extension of credit used to buy personal items. On or about December 20, 1996, Gonzalez executed a reaffirmation agreement that required him to pay AFS $20 per month against his outstanding debt to AFS. On February 20, 1997 the Bankruptcy Court entered a discharge order on all of Gonzalez's debts including the obligation to AFS. The reaffirmation agreement was not filed with the Court as required by § 524 of the Bankruptcy Code. Gonzalez's reaffirmation agreement also contained language indicating that AFS has the right to retain payments made in the event that the debtor rescinds which is a clear violation of § 524. Gonzalez made payments totaling $120 pursuant to the reaffirmation agreement.

As a result of this alleged conduct by defendants, plaintiffs bring this action against AVCO for violation of both the discharge injunction issued under § 524 of the Bankruptcy Code and the automatic stay which issued when the bankruptcy petitions were filed pursuant to 11 U.S.C. § 362(a). Plaintiffs' RICO and state law claims are also based on AVCO's conduct in securing the aforementioned reaffirmation agreements.

## II. Standard of Review

In ruling on a motion to dismiss, the Court construes the complaint in the light most favorable to plaintiff, taking all well-pleaded allegations as true and giving plaintiff the benefit of all reasonable inferences. *See Figueroa v. Rivera*, 147 F.3d 77, 80 (1st Cir. 1998). Dismissal under Rule 12(b) (6) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

*Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); 5A Wright & Miller, *Federal Practice & Procedure* § 1357 (1990).

**III. Subject Matter Jurisdiction and Venue**

Judge Mary Lisi of this Court has previously transferred a case raising these issues to the Bankruptcy Court pursuant to the discretionary referral provisions contained in 11 U.S.C. § 157(a). *See McGlynn v. Credit Store, Inc.*, 234 B.R. 576, 579 (D.R.I. 1999). This Court, however, chooses to decide these issues because it has jurisdiction over all cases under Title 11, and all civil proceedings "arising under," "arising in," or "related to" cases under Title 11 pursuant to 28 U.S.C. § 1334, and this area of the law should become settled as soon as possible.

The general venue statute is applicable in this case since plaintiffs have alleged violations of both the Bankruptcy Code and RICO. Venue is proper here under the general federal venue provisions because defendants reside in this district. The general venue statute, 28 U.S.C. § 1391(b) states that a "civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provide by law, be brought only in (1) a judicial district where any defendant resides . . . " The statute also states that for "purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c). Since defendants have admitted that personal jurisdiction exists here with

regard to all defendants, this Court is an appropriate forum to hear plaintiffs' claims.

## IV. No Private Right of Action Under § 524

### A. Applicable Law

Defendants argue that plaintiffs' claims under § 524 of the Bankruptcy Code should be dismissed because that provision contains no private right of action. Whether there is a private cause of action under § 524 of the Bankruptcy Code is a question of first impression in this District. Plaintiffs argue that this Court ought to imply a private right of action under § 524 in the absence of an express grant of a private remedy. Section 524 of the Bankruptcy Code provides in pertinent part:

> Effect of discharge
>
> (a) A discharge in a case under this title –
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a liability of the debtor, whether or not discharge of such debt is waived;
>
> (c) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable . . . only if –
>
> (3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of

> negotiating an agreement under this subsection, which states that such agreement –
>
> (A) represents a fully informed and voluntary agreement by the debtor; and
>
> (B) does not impose an undue hardship on the debtor . . . 11 U.S.C. § 524

It is clear from the language of the relevant subsections that § 524 does not expressly contemplate a private action for damages. Because § 524 does not authorize a private cause of action on its face, there is no basis for plaintiffs' claims unless they can demonstrate that Congress intended to create an implied private right of action. *See Maldonado v. Dominguez,* 137 F.3d 1 (1st Cir. 1998).

The United States Supreme Court has established a four part test for determining whether a court should imply a private remedy. Under *Cort v. Ash,* 422 U.S. 66 (1975) the four factors to consider are:

> (1) whether plaintiff is a member of a class for whose special benefit the statute was enacted; (2) whether there is any explicit or implicit indication of congressional intent to create or deny a private remedy; (3) whether a private remedy would be consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law.

*Id.* at 78 (citations omitted). Since *Cort,* the Supreme Court has explained and clarified the test's application. All four factors are not to be weighted equally. *Touche Ross & Co. v. Redington,* 442 U.S. 560, 575 (1979). "The most important inquiry is whether Congress intended to create the private remedy sought by the plaintiffs." *Suter*

*v. Artist M.*, 503 U.S. 347, 364 (1992) (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979)).

This Court's focus on congressional intent does not mean that there must be evidence that members of Congress actually had in mind, when enacting the statute, the creation of a private remedy. Rather, the implied cause of action doctrine recognizes that Congress' "intent may appear implicitly in the language or structure of the statute, or in the circumstances of the enactment." *Transamerica*, 444 U.S. at 18. The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

Further, the United States Court of Appeals for the First Circuit has stated that there is a strong presumption against implying a private right of action. *See Maldonado*, 137 F.3d at 7 (citing *Sterling Suffolk Racecourse v. Burrillville Racing*, 989 F.2d 1266, 1268 (1st Cir. 1993), *cert. denied*, 510 U.S. 1024 (1993)). In *Maldonado*, plaintiffs were seeking to have the court imply a private right of action under § 17(a) of the Securities Act of 1933. In holding that there is no private right of action under this provision, the Court noted that strong evidence of congressional intent must be present to overcome the presumption against implying a private right of action. *See id.* Without sufficient evidence of congressional intent to overcome this presumption, and "where the explicit remedies in the same statute address much of the same conduct and

benefit the same parties as a potential implied private right of action, the circumstances militate against that inference." *Id.* at 7-8.

**B. Application of the Law to the Facts**

In Counts I and II, plaintiffs allege that defendants have violated sections 524(c) and 524(a) (2) of the Bankruptcy Code. Count I alleges a violation of section 524(c) of the Bankruptcy Code, which establishes the procedure by which a creditor and debtor can agree to reaffirm a pre-petition debt so that the agreement is enforceable. Pursuant to §§ 524(c) and (d), the debtor may agree to reaffirm his or her pre-petition obligations that become discharged as a result of the bankruptcy proceeding. Such a reaffirmation agreement is binding on the debtor only if the creditor has complied with the strict procedures set forth in those subsections. *See Pereira v. First N.Am.Nat'l Bank*, 223 B.R. 28, 30 (N.D.Ga. 1998). Some courts have held that "[t]he sanction for failure to comply with the requirements of § 524(c) and (d) is unenforceability of the reaffirmation agreement." *In re Jackson*, 49 B.R. 298, 302 (Bankr.D.Kan. 1985); *In re Roth*, 38 B.R. 531, 539 (Bankr.N.D.Ill. 1984).

In Count II plaintiffs allege a violation of the discharge order created by section 524(a) (2). The discharge order operates as an injunction against the collection of pre-petition debt. This subsection does not establish a private cause of action for damages to remedy a violation of the discharge injunction. *See Costa v. Welch (In re Costa)*, 172 B.R. 954, 965 (Bankr.E.D.Cal. 1994). "Civil contempt is

the normal sanction for violation of the discharge injunction." 4 *Collier on Bankruptcy* ¶ 524.02[2] [c] (15th ed.1999); *see also In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997).

Unlike other provisions of the Bankruptcy Code, such as § 362, § 524 does not expressly provide a private remedy for aggrieved debtors who have unwittingly agreed to a reaffirmation agreement to pay off pre-petition debt which does not conform to the requirements of § 524. *See In re Holcomb*, 234 B.R. 79, 83 (Bankr.N.D.Ill. 1999). Indeed, it is readily apparent that no language in the statute expressly creates a private right of action. *See Costa*, 172 B.R. at 965. The absence of express language conferring a private remedy for violations of § 524 is clear. *See Perovich v. Humphrey (In re Perovich)*, No. 97 C 3209, 1997 WL 674975, at *3 (N.D.Ill.Oct. 28, 1997) (stating "this omission does not seem accidental where Congress did expressly provide similar remedies in other sections").

Consequently, plaintiffs argue that there is an implied remedy for damages under § 524. This argument fails the second and third *Cort* factors for implying a private action for damages. First, the most important *Cort* factor of congressional intent does not indicate that § 524 should be construed to imply a private remedy. As the Court in *Costa* noted, it is helpful to contrast the legislative history of § 524 with § 362, which expressly authorizes a debtor to recover damages for willful violations of the automatic stay. *See id.*, 172 B.R. at 965-966. In 1984 Congress enacted § 362(f) which allows individual debtors to recover actual and punitive damages for willful violations of § 362. *See* Pub. L. No. 98-353, § 304, 99

Stat. 333 (1984), *codified at* 11 U.S.C. § 362(h). Prior to 1984 § 362 did not afford a private remedy. Of central importance is the fact that Congress also amended § 524 in 1984 and failed to enact a similar provision. *See* Pub. L. No. 98-353, § 308, 99 Stat. 333 (1984), *codified at* 11 U.S.C. §§ 524(c) (2), 524(c). Congressional intent could not be more clear. If Congress intended that there be a private right of action under § 524 it could have easily inserted a similar private remedy provision in § 524 at that time. Congress chose not to do that. When Congress wishes to provide a private damages remedy, it knows how to do so. *See Redington*, 442 U.S. at 572. Congress did just that when it amended § 362 in 1984. Thus, legislative history clearly indicates that Congress did not want to create a private right of action for a violation of § 524.

The third *Cort* factor is also not satisfied in this case. The legislative scheme expressly provides for a discharge of the debtor's debt in the form of a permanent injunction. The common relief for violation of a discharge injunction under § 524(a) (2) is through the court's inherent contempt power. *See Cox v. Zale, Del., Inc.*, No. 97 C 4464, 1998 WL 397841, at *3 (N.D.Ill.July 13, 1998); *see also* 4 *Collier on Bankruptcy* ¶ 524.02[2] [c] (15th ed.1999). In this case, implying a private right of action for AVCO's alleged violation of the discharge injunction would be inconsistent with the underlying legislative scheme since Congress has already provided a remedy for such abuses. *See Costa*, 172 B.R. at 966.

In support of their argument to imply a private remedy, plaintiffs cite cases where damages have been afforded under § 524. These cases, however, only support an award of damages under either the court's inherent

contempt power or its statutory contempt power under § 105(a). *See In re Hardy*, 97 F.3d 1384, 1389-1390 (11th Cir. 1996) (awarding compensatory damages to the debtor under the court's statutory contempt power for violation of the discharge injunction); *In re Latanowich*, 207 B.R. 326, 333 (Bankr.D.Mass. 1997) (awarding compensatory and punitive damages for violation of the discharge order through a contempt proceeding); *In re Walker*, 180 B.R. 834 (Bankr.W.D.La. 1995) (awarding compensatory and punitive damages for willful violation of the discharge order under the court's contempt power). Quite simply, the damages awarded in the cases cited by plaintiffs are in the form of contempt sanctions, which are different in kind from the extraordinary relief plaintiffs seek in this case.

In this case, plaintiffs have not purported to bring a claim in contempt requesting relief pursuant to the court's inherent contempt power or under the § 105 statutory contempt power. Even if they had, this Court would be unable to fashion relief for all of the named plaintiffs, because "[s]anctions for violations of an injunction, in any event, are generally administered by the court that issued the injunction." *Baker v. General Motors Corp.*, 522 U.S. 222, 236 (1998) (citing *Stiller v. Hardman*, 324 F.2d 626, 628 (2nd.Cir. 1963) (holding that enforcement of injunctive relief must be issued by the rendition forum)); *see Pereira*, 223 B.R. at 31 ("the court whose order has been defied must entertain the contempt action"). Therefore, the as yet uncertified class action filed by plaintiffs would be an inappropriate vehicle for addressing the alleged

violations of the discharge injunction by AVCO. According to plaintiffs' complaint, AVCO's collection of plaintiffs' pre-petition debt violated the discharge injunction mandated under § 524 of the Bankruptcy Code. Consequently, a request for contempt relief must be filed in the various fora that issued the discharge order.

Finally, plaintiffs make a last ditch effort to imply a cause of action under the statutory contempt power set forth in § 105(a) to support the alleged violations of § 524. Section 105(a) states in relevant part: "The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

At first blush the broad phrasing of § 105(a) gives credence to plaintiffs' assertion. However, the First Circuit Court of Appeals has stated that "section 105(a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes 'a roving commission to do equity.' " *Noonan v. Secretary of Health & Human Servs. (In re Ludlow Hosp. Soc'y Inc.)*, 124 F.3d 22, 27 (1st Cir. 1997). Section 105(a) is best utilized as an equitable enforcement tool connected to substantive rights already established under the Code and not simply to further a bankruptcy concept or objective. *See* 2 *Collier on Bankruptcy* ¶ 105.01[1] (15th ed. 1999).

In this case, plaintiffs argue that this Court ought to imply a private remedy under § 105 because § 524 does not permit the remedy sought. However, "section 105(a) [does not] authorize courts to create substantive rights that are otherwise unavailable under the Code." *In re Ludlow*, 124 F.3d at 28 (quoting *In re SPM Mfg. Corp.*, 984

F.2d 1305, 1311 (1st Cir. 1993)). Moreover, courts have been reluctant to imply a private remedy under § 105(a) under the *Cort* analysis. *See Holloway v. Household Automotive Finance Corp. (In re Holloway )*, 227 B.R. 501 (Bankr.N.D.Ill. 1998) (holding there is no private cause of action under § 105(a)); *see also Simmons v. Ford Motor Credit Co. (In re Simmons)*, 224 B.R. 879, 884 (Bankr.N.D.Ill. 1998) (stating that "the authority given the courts under § 105 is not without limits"). Therefore, plaintiffs' attempt to bootstrap their § 524 claim onto § 105(a) fails because the latter is not to be used for the purpose of creating private remedies that are not expressly or impliedly created in other provisions of Title 11. *See id.*

Although § 105(a) cannot be used in this kind of case, it may be used to support contempt proceedings. *See, e.g., Pereira*, 223 B.R. at 31. As stated earlier, this is not a contempt proceeding. Plaintiffs have alleged that AVCO has committed egregious violations of the Bankruptcy Code. Unfortunately for plaintiffs, they have failed to seek the remedies afforded by the Bankruptcy Code.

Only one case has found an implied private right of action under § 524, *Rogers v. Credit Fin. Serv. Corp.*, 233 B.R. 98, 108 (N.D.Cal. 1999). In *Rogers*, the named plaintiffs sought class-wide relief for persons who had filed for bankruptcy relief and had paid discharged debts to the defendant as a result of the defendant's alleged requests and harassment.

That decision is unpersuasive for the reasons already stated. First, in 1984 when Congress added a private remedy to § 362, Congress also amended § 524 but failed to add a similar provision. The holding of the *Rogers*

Court partly turns on the strong remedial language of Congress to be found in the legislative history of § 524 when that provision was originally enacted in 1978. *Id.* at 109 (quoting H.R.Rep. No. 95-595, at 163, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6124). Yet the *Rogers* Court fails to mention that Congress revisited § 524 in 1984 and failed to add a private remedy provision while at the same time adding one to § 362. *Id.* Second, the *Rogers* Court also rests its decision on the § 105(a) statutory contempt power. *Id.* As already discussed, such an argument overlooks the limitations of § 105(a) and the fact that the First Circuit and other courts have been unwilling to create remedies that are not supported by substantive rights afforded by the Code. This Court simply will not imply a private right of action by judicial fiat absent clear legislative intent. For the foregoing reasons Counts I and II are dismissed for failing to state a cause of action upon which relief can be granted.

## V. Failure To State a Claim Under § 362

### A. Applicable Law

As noted earlier, the automatic stay provision of § 362(a) prohibits a creditor from taking action to collect pre-petition debts. Accordingly, the analysis to be used in determining whether there has been a violation of the automatic stay begins with consideration of that Code section, which states that the filing of a petition in bankruptcy operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a) (6).

The purpose of the automatic stay is to shield the debtor from financial pressure during the pendency of the bankruptcy proceeding. *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997) (citing H.R.Rep.No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97). The stay is dissolved upon disposition of the case or issuance of the discharge injunction. *See Soares*, 107 F.3d at 975 (citing 11 U.S.C. § 362). Consequently, § 362 only prohibits collection efforts during the automatic stay period. More importantly, § 362(h), unlike § 524, provides an express private right of action for "any willful violation of a stay."

It appears from the language of § 362 that almost any attempt made by a creditor to collect a pre-petition debt violates the automatic stay. However, it is critical to read the Bankruptcy Code as an integrated process. By so doing, one can easily recognize the potential tension between the prohibition on collection efforts provided in § 362(a) (6) and § 524(c), which authorizes negotiations to secure reaffirmation agreements. Many courts, therefore, have found that creditor collection efforts must be coercive and harassing for those efforts to constitute a violation of the automatic stay. *In re Duke*, 79 F.3d 43, 44-45 (7th Cir. 1996); *Morgan Guar. Trust Co. v. Amer. Sav. & Loan*, 804 F.2d 1487, 1491 (9th Cir. 1986) (finding that "the language and purposes of section 362(a) do not bar mere requests for repayment unless some element of coercion or harassment is involved"). One court has explained that the protection of § 362 "is not from communication with creditors, but from the threat of immediate action by creditors, such as foreclosure or a lawsuit." *Brown v.*

*Pennsylvania State Employees Credit Union*, 851 F.2d 81, 86 (3rd Cir. 1988) (citations omitted).

**B. Application of the Law to the Facts**

In Count III of the Second Amended Complaint, plaintiffs Bessette and Gonzalez merely allege that AVCO mailed unauthorized reaffirmation agreements to them, which were, in turn, signed by them and then they made payments pursuant to those agreements. Plaintiffs fail to allege any acts of defendants which constitute harassment or coercion. *See* Second Amended Complaint ¶¶ 28, 29, 43-49.

Many courts have concluded that similar acts lack the requisite coercion which is required in order to state a claim under § 362. It has been held that mailing a letter directly to both the debtor and the debtor's lawyer which requests payment of a pre-petition debt does not create a claim under § 362(a) upon which relief can be granted. *See In re Jefferson*, 144 B.R. 620, 623-624 (Bankr.D.R.I. 1992). Similarly, in *Duke*, the creditor initiated negotiations for reaffirmation agreements by sending a copy of the request to both the debtor's attorney and the debtor himself. The *Duke* Court found those acts to lack the necessary coercive effect required to violate § 362. *See Duke*, 79 F.3d at 46. These two cases can be contrasted with *In re Flynn*, 143 B.R. 798, 802-803 (Bankr.D.R.I. 1992), where the Court held that a credit union's direct telephone contact with the debtor, while knowing that she was represented by counsel, for the sole purpose of coercing a reaffirmation of the debt, was a sanctionable violation of § 362(a) (6).

If any and all communications initiated by a creditor for purposes of securing reaffirmation of a pre-petition debt are held to violate § 362(a) (6), then the creditor's ability to negotiate reaffirmation agreements is essentially destroyed. "[A]n interpretation of § 362(a) (6) which prevents creditors from negotiating reaffirmation agreements would significantly impair the bankruptcy process." *In re Jefferson*, 144 B.R. at 623 (quoting *In re Briggs*, 143 B.R. 438, 452 (Bankr.E.D.Mich. 1992)).

In this case, plaintiffs have failed to state a claim under § 362(a) because they have only alleged bare bone facts relating to the negotiation of the reaffirmation agreements. A mere request to reaffirm the debt, absent additional facts, does not constitute coercive or harassing conduct. *See In re Jefferson*, 144 B.R. at 623. Indeed, plaintiffs admit this defect exists in their Complaint by referring to acts that are not pleaded in order to establish coercive and harassing conduct and thus forestall dismissal. *See* Plaintiffs' memo. at 25. In deciding this motion, the Court will not consider facts dehors the pleadings. Consequently, plaintiffs have failed to make the necessary allegations of coercive acts that are required to constitute a violation of the automatic stay provision in § 362(a). Maybe coercive tactics were employed by AVCO, *see* Bessette Aff., ¶¶ 3-8, but those allegations must be included in the complaint. For the foregoing reasons, Count III is dismissed for failure to state a cause of action, but plaintiffs are granted leave to further amend the Second Amended Complaint to make the allegations required to state a claim under § 362(a) of the Bankruptcy Code.

## VI. RICO Claims

### A. Applicable Law

In Counts IV, V and VI, plaintiffs assert that use of the mails by the defendants to obtain revenues from the reaffirmation agreements resulted in a violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. *See* Second Amended Complaint, ¶¶ 90-109. More specifically, in their brief, plaintiffs allege that defendants have violated § 1962(c) of RICO[1], which makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . " 18 U.S.C. § 1962(c). To state a claim under § 1962(c), a plaintiff must allege each of the four elements required by the statute: 1) conduct; 2) of an enterprise; 3) through a pattern; 4) of racketeering activity. *See Libertad v. Welch*, 53 F.3d 428, 441 (1st Cir. 1995).

The First Circuit has consistently held that a well-pleaded complaint under RICO must allege that the

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[1] This Court assumes that plaintiffs are not alleging RICO violations under § 1962(a) since they failed to plead any facts that established an "investment" injury. Nor have plaintiffs pleaded any facts establishing an "acquisition" injury under § 1962(b). *See Compagnie De Reassurance D'Ile De France v. New England Reinsurance Corp.*, 57 F.3d 56, 91 (1st Cir. 1995), *cert. denied*, 516 U.S. 1009 (1995).

"enterprise," through which the unlawful pattern of racketeering activity is committed, is a separate entity from the RICO "person," or defendant. *See, e.g., Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44-45 (1st Cir. 1991). "[T]he 'person' alleged to be engaged in racketeering activity (the defendant, that is) must be an entity distinct from the 'enterprise;' under § 1962(c) the enterprise is not liable." *Odishelidze v. Aetna Life & Cas.*, 853 F.2d 21, 23 (1st Cir. 1988). Indeed, most Circuits follow this established rule. *See Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 155-156 (5th Cir. 1997) (plaintiff failed to plead any distinct roles for the subsidiary and the parent so that they might be regarded as having any distinctiveness from the alleged association-in-fact enterprise); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-1064 (2d Cir. 1996) (where corporate entities are legally separate but "operate within a unified corporate structure" and are guided by a single corporate consciousness they cannot be both the "enterprise" and the "person" who conducts the affairs of the enterprise through a pattern of racketeering), *vacated on other grounds*, 525 U.S. 128 (1998); *NCNB Nat'l Bank of N.C. v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987) (bank could not be held liable under either § 1962(a) or (c) where its holding company and sole shareholder were alleged to be the enterprise); *Emery v. Amer. Gen. Fin., Inc.*, 134 F.3d 1321, 1324 (7th Cir. 1998) (holding that there can be no § 1962(c) claim against a subsidiary when the parent can exercise power over the subsidiary that is inherent in its ownership of wholly owned subsidiaries), *cert. denied*, 119 S.Ct. 57 (1998).

This rule of distinctiveness has led to two separate requirements when a § 1962(c) violation under RICO is

alleged. First, because the "enterprise" can not be liable under this subsection, the defendant can not also be the alleged "enterprise" named in the complaint. The reason for this is obvious – "the unlawful enterprise itself cannot also be the person the plaintiff charges with conducting it." *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 190 (1st Cir. 1996) (quoting *Arzuaga-Collazo v. Oriental Fed. Sav. Bank*, 913 F.2d 5, 6 (1st Cir. 1990)).

Second, when analyzing whether the distinctiveness requirement is satisfied when the named "person" under § 1962(c) is a subsidiary of the alleged "enterprise," the named "enterprise" must be sufficiently distinct from the named "person," i.e. defendant, so that the two are not in reality the same entity. Otherwise, if the two entities are in fact the same then the requirement that the named "enterprise" be insulated from liability under § 1962(c) is unmet. One First Circuit panel has stated that if the "enterprise" benefits from the person's unlawful activities then neither is distinct for § 1962(c) purposes. *See Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 31 (1st Cir. 1986); *see also Deane v. Weyerhaeuser Mortgage Co.*, 967 F.Supp. 30, 34-35 (D.Mass. 1997). Furthermore, the First Circuit has also held that the § 1962(c) claim ought to be dismissed when it appears that the subsidiary did not take any actions independent from its parent. *See Compagnie De Reassurance D'Ile De France v. New England Reinsurance Corp.*, 57 F.3d 56, 91 (1st Cir. 1995), *cert. denied*, 516 U.S. 1009 (1995).

**B. Application of the Law to the Facts**

In their Complaint, plaintiffs slice up AVCO's corporate structure in every way conceivable to circumvent the well established distinctiveness requirement under § 1962(c) of RICO. At the end of the day, plaintiffs have only served up different pieces of the same pie.

As stated earlier, Textron is a holding company and its wholly owned subsidiary, AFS, is engaged in the consumer finance business. AFS, a named defendant, in turn is the sole owner of defendant AFS Management, which provides management services to AFS and AFS' other United States subsidiaries. The individual defendants, John Does 1 through 10, are charged with "securing the reaffirmation agreements." Second Amended Complaint, ¶ 16. All of the finance business conducted by the holding company is delegated to AFS. *See id.*, ¶ 8. All receivables and income generated by AFS' subsidiaries are reported as assets and income on the financial statements of AFS. All receivables and income of AFS are reported as assets and income on the financial statements of the holding company Textron. *See id.*, ¶ 17.

Count IV alleges that AFS Management is the "person" that conducted the affairs of Textron, the alleged "enterprise," through a pattern of racketeering activity. Although Textron is not a named defendant, the issue is whether AFS Management is, in reality, the same entity as Textron which would cause violation of the distinctiveness requirement under § 1962(c). If AFS Management conducted its reaffirmation agreement activities as a division of Textron, then most courts would certainly preclude a RICO claim because the person and enterprise

would then be the same entity. *See Emery*, 134 F.3d at 1324 (citing *Compagnie De Reassurance*, 57 F.3d at 92). In dismissing a RICO claim on similar facts to the present case, the *Emery* Court noted that precluding a RICO claim where the "person" is a division of the parent "enterprise," but allowing the claim where the "person" is an incorporated wholly owned subsidiary is a difference unrelated to any goal or policy of RICO. *Id.*

This Court has found that the only case which permitted a RICO claim against a subsidiary where the enterprise was the parent corporation is *Haroco, Inc. v. Amer. Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985). In *Haroco*, however, criminals took over a corporate subsidiary which then managed to wrest control of the parent corporation and use the parent as an instrument for further criminal activities. The Seventh Circuit has since restricted the holding in *Haroco* to those facts which hold a "family resemblance to the paradigmatic RICO case in which a criminal obtains control of a legitimate firm and uses the firm as the instrument of his criminality." *Emery*, 134 F.3d at 1324; *see also Fitzgerald v. Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997).

For the proposition that a subsidiary is not distinct from its parent for RICO purposes defendants cite *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996). The *Discon* Court correctly observed the inconsistency in a situation where a RICO claim could be permitted against a RICO "person" simply because it was separately incorporated. *See id.* at 1064.

This Court, however, declines to follow the bright line rule that a subsidiary is never distinct from its parent for RICO purposes. The First Circuit has not established a clear test for distinctiveness. In dismissing a § 1962(c) claim for lack of distinctiveness, however, the First Circuit has looked to see if there is evidence that the subsidiary took actions independent of the parent enterprise. *See Compagnie De Reassurance*, 57 F.3d at 92 (citing *Brittingham v. Mobil Corp.*, 943 F.2d 297, 302-303 (3rd Cir. 1991) (noting that § 1962(c) claims may be dismissed when the "person" and "enterprise" are in reality no different from each other because they are part of the same corporate group)). While it is true that in *Compagnie De Reassurance* the named "enterprise" was the subsidiary rather than the parent corporation, this Court finds that such a distinction would not further the purpose of the distinctiveness requirement. Therefore, the mere allegation that the RICO "person" is the subsidiary conducting the affairs of the parent is not sufficient to state a claim under § 1962(c). *See Brannon v. Boatmen's First Nat'l. Bank of Oklahoma*, 153 F.3d 1144, 1147-1148 (10th Cir. 1998) (dismissing § 1962(c) claim for violating distinctiveness requirement because plaintiff only alleged that the RICO "person" was the subsidiary that conducted the affairs of the parent).

In this case, plaintiffs failed to allege that AFS Management took any actions independent of Textron. Plaintiffs have merely alleged that AFS, as the RICO "person," conducted the affairs of the "enterprise," Textron. Indeed, the Second Amended Complaint states that the finance operations of Textron were delegated to AFS and AFS Management. Consequently, where the named "person"

is a wholly owned subsidiary under the complete control of the parent "enterprise" it is unlikely that the subsidiary took any actions independent of its parent. As a result, although the two corporations are facially distinct they are part of the same corporate entity. Thus, in this case the distinctiveness requirement that "the same entity cannot do double duty as both the RICO defendant and the RICO enterprise" is violated. *Miranda*, 948 F.2d at 44-45.

As stated earlier, additional evidence of the two companies integrated corporate structure is demonstrated by the fact that AFS Management's income was included on the financial statements of Textron. "When the enterprise benefits from the person's unlawful activities neither is distinct for Section 1962(c) purposes." *Weyerhaeuser*, 967 F.Supp. at 34-35 (D.Mass. 1997) (dismissing RICO claims where the parent-subsidiary relationship shows an integrated operational relationship between the companies named as the "person" and "enterprise"). For the foregoing reasons Count IV is dismissed for failure to state a RICO cause of action.

Plaintiffs attempt to serve up a different piece of the corporate pie in Count V, which names AFS Management as the "person" and AFS and its consumer finance subsidiaries as the "enterprise." AFS is a named defendant. Here, plaintiffs have clearly violated the rule that the named "enterprise" is insulated from liability under § 1962(c). Further, the distinction between AFS Management and AFS is more blurred given that both companies share officers and directors. *See* Second Amended Complaint, ¶ 12. It is clearly evident that AFS and AFS Management are the same corporate entity thereby violating

the distinctiveness requirement that the "person" and the "enterprise" be distinct entities. *See Miranda*, 948 F.2d at 44-45. As a result, Count V is also dismissed for failure to state a RICO cause of action.

Finally, in Count VI plaintiffs change the players one last time and name John Does 1 through 10 as the "person" and AFS and Textron as the "enterprise." Plaintiffs again make the mistake of naming a defendant as the alleged "enterprise," which is insulated from liability under § 1962(c). In addition, the First Circuit has stated in no uncertain terms that the named defendants and their officers or employees cannot be the entity that conducts its own affairs through a pattern of racketeering activity. *See Odishelidze*, 853 F.2d at 23. Similarly, other courts have held that "[b]ecause a corporation can only function through its employees and agents, any acts of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself." *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994). Further, an employee cannot be considered distinct from his corporate employer when the employee is acting at the employer's behest. *See Emery*, 134 F.3d at 1324.

In this case, plaintiffs have admitted that John Does 1 through 10, as the responsible agents of AFS and its subsidiaries, conducted the business activities of AFS and Textron. *See* Second Amended Complaint, ¶ 108. As a result, because the Does are the employees of the named "enterprise" in Count VI, the distinctiveness requirement is again violated because AFS and Textron are alleged to be conducting the affairs of itself. Consequently, plaintiffs have again failed to identify an "enterprise" which is

distinct from the named "person." Count VI must also be dismissed for failure to assert a RICO claim.

**VII. State Law Claims**

In Count VII plaintiffs allege a state law claim for unjust enrichment based upon defendants' alleged violations of the Bankruptcy Code. Although all of plaintiffs' federal claims have been dismissed at this point, this Court will proceed to decide the state law claim because that claim will resurface if plaintiffs successfully amend Count III to state a claim under § 362 of the Bankruptcy Code. In addition, this Court has discretion to exercise supplemental jurisdiction over a claim where it has dismissed all claims over which it had original jurisdiction. *See* 28 U.S.C. § 1367(c) (3).

Defendants contend that the state law claim is preempted by the Bankruptcy Code. This Court agrees on that point. In *Summit Inv. & Dev. Corp. v. Leroux*, 69 F.3d 608, 611-613 (1st Cir. 1995), the Court held that § 365(e) of the Bankruptcy Code preempted claims based upon the Massachusetts Limited Partnership Act, despite the fact that this subsection of the Code contains a preemption exception. The provisions of the Bankruptcy Code at issue in this case have no such exception. Consequently, the argument for preemption of the state law claim is even stronger.

The cases cited by plaintiffs are less than persuasive. Many of the cases cited by plaintiffs, in support of the proposition that their state law claim is not preempted, deal with the McCarran-Ferguson Act, which specifically

contains an anti-preemption provision in order to preserve state regulation of the insurance industry. *See, e.g., Villafane-Neriz v. FDIC*, 75 F.3d 727, 735 (1st Cir. 1996).

Congress' power to preempt state law is derived from the Supremacy Clause of the United States Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI; *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). The underlying impetus for preemption of state law is congressional intent. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-486 (1996).

State law is generally preempted for two reasons. First, if Congress intended federal law to occupy the field exclusively, then state law regulating conduct in that area is preempted. *Id.* Preemption of state law in this manner "may be found from a 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Second, state law is also preempted where it conflicts with federal law in such a way that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (citations omitted).

In this case, plaintiffs state law claim for unjust enrichment piggybacks on their claims of violations of §§ 524 and 362 of the Bankruptcy Code. Many courts have

found that the extensive reach of the Bankruptcy Code preempts virtually all claims relating to misconduct in the bankruptcy court. *See MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 912-915 (9th Cir. 1996) (stating that the "comprehensive provisions of the lengthy Bankruptcy Code . . . demonstrates Congress's intent to create a whole system under federal control"); *see also Cox v. Zale Del. Inc.*, No. 97 C 4464, 1998 WL 397841, at *5 (N.D.Ill.July 13, 1998). In *Cox*, the Court dismissed plaintiffs' state law claims that were based upon violation of §§ 524 and 362 of the Bankruptcy Code because the state law claims depended solely upon the alleged violations of the Code. *Id.* Of central importance to the *Cox* Court was the fact that the Code has its own enforcement scheme for such violations, which is in the form of contempt sanctions. *Id.* One court has stated that "the Bankruptcy Code provides a comprehensive scheme reflecting a balance, completeness and structural integrity that suggests remedial exclusivity." *Brandt v. Swisstronics, Inc. (In re Shape)*, 135 B.R. 707, 708 (Bankr.D.Me. 1992).

In this case, the Bankruptcy Code provides the remedial scheme for addressing violations of §§ 524 and 362, including possible contempt sanctions under the bankruptcy court's inherent contempt power and § 105. *See Pereira v. First N. Amer. Nat'l Bank*, 223 B.R. 28, 31 (N.D.Ga. 1998) (dismissing state law claims based upon alleged violations of §§ 524 and 362 of the Bankruptcy Code). As stated previously, a complaint filed in the appropriate forum would allow plaintiffs to take advantage of the remedies that the Code affords under the subsections at issue in this case. It is clear that Congress intended that violations of the automatic stay and the

discharge injunction be remedied through the Bankruptcy Code rather than through state law actions for unjust enrichment. Plaintiffs' state law claim for unjust enrichment, which is based solely upon alleged violations of §§ 524 and 362, therefore, are preempted by the Bankruptcy Code. Consequently, Count VII is dismissed for failure to assert a viable state law cause of action.

## Conclusion

For the foregoing reasons defendants' motion to dismiss plaintiffs' Second Amended Complaint is granted for failure to state claims upon which relief may be granted. Plaintiffs are hereby granted leave to file an amended Count III only. Plaintiffs have thirty (30) days from the date hereof to file the amended complaint, and defendants twenty (20) days after filing to respond thereto. No judgments will enter until all claims in this case are resolved.

It is so ordered.

/s/ Ronald R. Lagueux
Ronald R. Lagueux
Chief Judge
October 18, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Cheryl Bessette and
Francisco Gonzalez, for
themselves and on behalf
of all others similarly
situated

Vs. CA NO. 97-487L

Avco Financial Services,
Inc. Avco Financial
Services of RI Inc., Avco
Financial Services of
Colorado Inc.

Judgment

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has render [sic]

[X] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and

IT IS ORDERED AND ADJUDGED:

**Judgment is entered for the defendants.**

/s/ Barbara J. D'Amico
Deputy Clerk

November 15, 1999

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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No. 99-2291

CHERYL BESSETTE, FOR HERSELF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiff, Appellant,
v.
AVCO FINANCIAL SERVICES, INC.; AVCO FINANCIAL SERVICES, OF RHODE ISLAND, INC.; AVCO FINANCIAL SERVICES OF COLORADO INC.; AVCO FINANCIAL SERVICES MANAGEMENT CO.,
Defendants, Appellees.

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**BEFORE**
**Torruella,** ***Chief Justice***
**Campbell*,** ***Senior Circuit Judge,***
**Boudin, Stahl, Lipez,** ***Circuit Judges,***
**Schwarzer**,** ***District Court Judge.***

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**ORDER OF THE COURT**
Entered: December 15, 2000

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majroity of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

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***Judge Campbell did not participate in this matter**

****of the 9th District, sitting by designation**

It is ordered that the petition for rehearing en banc be denied.

**By the Court**
**PHOEBE D. MORSE, CLERK**
**By: /s/ _____**
**Chief Deputy Clerk**

**cc: All Counsel of Record**

**U.S. Const. art. I, § 8, cl.4.**

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

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**11 U.S.C. § 105. Power of court**

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court on its own motion or on the request of a party in interest, may –

(1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that –

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title –

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be

combined with the hearing on confirmation of the plan.

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**11 U.S.C. § 362 Automatic stay**

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section –

(A) of the commencement or continuation of an action or proceeding for –

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed, Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and

claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of –

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the

Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing out of the petition.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor

whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) –

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final

hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

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**11 U.S.C. § 524. Effect of discharge**

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1) of this title, or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

(b) Subsection (a)(3) of this section does not apply if –

(1)(A) the debtor's spouse is a debtor in a case under this title, or a bankrupt or a debtor in a case under the Bankruptcy Act, commenced within six

years of the date of the filing of the petition in the case concerning the debtor; and

(B) the court does not grant the debtor's spouse a discharge in such case concerning the debtor's spouse; or

(2)(A) the court would not grant the debtor's spouse a discharge in a case under chapter 7 of this title concerning such spouse commenced on the date of the filing of the petition in the case concerning the debtor; and

(B) a determination that the court would not so grant such discharge is made by the bankruptcy court within the time and in the manner provided for a determination under section 727 of this title of whether a debtor is granted a discharge.

(C) An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if –

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2)(A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that

such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that –

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of –

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, which ever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

(6)(A) in a case concerning an individual who was not represented by an attorney during the course of negotiating an agreement under this subsection, the court approves such agreement as –

(i) not imposing an undue hardship on the debtor or a dependent of the debtor; and

(ii) in the best interest of the debtor.

(B) Subparagraph (A) shall not apply to the extent that such debt is a consumer debt secured by real property.

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall –

(1) inform the debtor –

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of –

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in

part on a consumer debt that is not secured by real property of the debtor.

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

(f) Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt.

(g)(1)(A) After notice and hearing, a court that enters an order confirming a plan of reorganization under chapter 11 may issue, in connection with such order, an injunction in accordance with this subsection to supplement the injunctive effect of a discharge under this section.

(B) An injunction may be issued under subparagraph (A) to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any claim or demand that, under a plan of reorganization, is to be paid in whole or in part by a trust described in paragraph (2)(B)(i), except such legal actions as are expressly allowed by the injunction, the confirmation order, or the plan or reorganization.

(2)(A) Subject to subsection (h), if the requirements of subparagraph (B) are met at the time an injunction described in paragraph (1) is entered, the after entry of such injunction, any proceedings that involves the validity, application, construction, or modification of such injunction, or of this subsection with respect to such injunction, may be commenced only in the district court in which such injunction was entered, and such court shall have exclusive

jurisdiction over any such proceeding without regard to the amount in controversy.

(B) The requirements of this subparagraph are that –

(i) the injunction is to be implemented in connection with a trust that, pursuant to the plan of reorganization –

(I) is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products;

(II) is to be funded in whole or in part by the securities of 1 or more debtors involved in such plan and by the obligation of such debtor or debtors to make future payments, including dividends;

(III) is to own, or by the exercise of rights granted under such plan would be entitled to own if specified contingencies occur, a majority of the voting shares of –

(aa) each such debtor;

(bb) the parent corporation of each such debtor; or

(cc) a subsidiary of each such debtor that is also a debtor; and

(IV) is to use its assets or income to pay claims and demands; and

(ii) subject to subsection (b), the court determines that –

(I) the debtor is likely to be subject to substantial future demands for payment arising out of the same or similar conduct or events that gave rise to the claims that are addressed by the injunction;

(II) the actual amounts, numbers, and timing of such future demands cannot be determined;

(III) pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose to deal equitably with claims and future demands;

(IV) as part of the process of seeking confirmation of such plan –

(aa) the terms of the injunction proposed to be issued under paragraph (1)(A), including any provisions barring actions against third parties pursuant to paragraph (4)(A), are set out in such plan and in any disclosure statement supporting the plan; and

(bb) a separate class or classes of the claimants whose claims are to be addressed by a trust described in clause (i) is established and votes, by at least 75 percent of those voting, in favor of the plan; and

(V) subject to subsection (b), pursuant to court orders or otherwise, the trust will operate through mechanisms such as structured, periodic, or supplemental payments, pro rata distributions, matrices, or periodic review of estimates of the numbers and values of present claims and future demands, or other comparable mechanisms, that provide reasonable assurance that the trust will value, and be in a financial position to pay, present claims and future demands that involve similar claims in substantially the same manner.

(3)(A) If the requirements of paragraph (2)(B) are met and the order confirming the plan of reorganization was issued or affirmed by the district court that has jurisdiction over the reorganization case, then after the time for appeal of the order that issues or affirms the plan –

(i) the injunction shall be valid and enforceable and may not be revoked or modified by any court except through appeal in accordance with paragraph (6);

(ii) no entity that pursuant to such plan or thereafter becomes a direct or indirect transferee of, or successor to any assets of, a debtor or trust that is the subject of the injunction shall be liable with respect to any claim or demand made against such entity by reason of its becoming such a transferee or successor; and

(iii) no entity that pursuant to such plan or thereafter makes a loan to such a debtor or trust or to such a successor or

transferee shall, by reason of making the loan, be liable with respect to any claim or demand made against such entity, nor shall any pledge of assets made in connection with such a loan be upset or impaired for that reason;

(B) Subparagraph (A) shall not be construed to –

(i) imply that an entity described in subparagraph (A)(ii) or (iii) would, if this paragraph were not applicable, necessarily be liable to any entity by reason of any of the acts described in subparagraph (A);

(ii) relieve any such entity of the duty to comply with, or of liability under, any Federal or State law regarding the making of a fraudulent conveyance in a transaction described in subparagraph (A)(ii) or (iii); or

(iii) relieve a debtor of the debtor's obligation to comply with the terms of the plan of reorganization, or affect the power of the court to exercise its authority under sections 1141 and 1142 to compel the debtor to do so.

(4)(A)(i) Subject to subparagraph (B), an injunction described in paragraph (1) shall be valid and enforceable against all entities that it addresses.

(ii) Notwithstanding the provisions of section 524(c), such an injunction may bar any action directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable for the conduct of, claims

against, or demands on the debtor to the extent such alleged liability of such third party arises by reason of –

(I) the third party's ownership of a financial interest in the debtor, a past or present affiliate of the debtor, or a predecessor in interest of the debtor;

(II) the third party's involvement in the management of the debtor or a predecessor in interest of the debtor, or service as an officer, director or employee of the debtor or a related party;

(III) the third party's provision of insurance to the debtor or a related party; or

(IV) the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the debtor or a related party, including but not limited to –

(aa) involvement in providing financing (debt or equity), or advice to an entity involved in such a transaction; or

(bb) acquiring or selling a financial interest in an entity as part of such a transaction.

(iii) As used in this subparagraph, the term "related party" means –

(I) a past or present affiliate of the debtor;

(II) a predecessor in interest of the debtor;

(III) any entity that owned a financial interest in –

(aa) the debtor;

(bb) a past or present affiliate of the debtor; or

(cc) a predecessor in interest of the debtor.

(B) Subject to subsection (h), if, under a plan of reorganization, a kind of demand described in such plan is to be paid in whole or in part by a trust described in paragraph (2)(B)(i) in connection with which an injunction described in paragraph (1) is to be implemented, then such injunction shall be valid and enforceable with respect to a demand of such kind made, after such plan is confirmed, against the debtor or debtors involved, or against a third party described in subparagraph (A)(ii), if –

(i) as part of the proceedings leading to issuance of such injunction, the court appoints a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands of such kind, and

(ii) the court determines, before entering the order confirming such plan, that identifying such debtor or debtors, or such third party (by name or as part of an identifiable group), in such injunction with respect to such demands for purposes of this subparagraph is fair and equitable with respect to the persons that might subsequently

assert such demands, in light of the benefits provided, or to be provided, to such trust on behalf of such debtor or debtors or such third party.

(5) In this subsection, the term "demand" means a demand for payment, present or future, that –

(A) was not a claim during the proceedings leading to the confirmation of a plan of reorganization;

(B) arises out of the same or similar conduct or events that gave rise to the claims addressed by the injunction issued under paragraph (1); and

(C) pursuant to the plan, is to be paid by a trust described in paragraph (2)(B)(i).

(6) Paragraph (3)(A)(i) does not bar an action taken by or at the direction of an appellate court on appeal of an injunction issued under paragraph (1) or of the order of confirmation that relates to the injunction.

(7) This subsection does not affect the operation of section 1144 of the power of the district court to refer a proceeding under section 157 of title 28 or any reference of a proceeding made prior to the date of the enactment of this subsection.

(h) Application to existing injunctions. – For purposes of subsection (g) –

(1) subject to paragraph (2), if an injunction of the kind described in subsection (g)(1)(B) was issued before the date of the enactment of this Act, as part of a plan of reorganization confirmed by an order entered before such date, then the injunction shall be

considered to meet the requirements of subsection (g)(2)(B) for purposes of subsection (g)(2)(A), and to satisfy subsection (g)(4)(A)(ii), if –

(A) the court determined at the time the plan was confirmed that the plan was fair and equitable in accordance with the requirements of section 1129(b);

(B) as part of the proceedings leading to issuance of such injunction and confirmation of such plan, the court had appointed a legal representative for the purpose of protecting the rights of persons that might subsequently assert demands described in subsection (g)(4)(B) with respect to such plan; and

(C) such legal representative did not object to confirmation of such plan or issuance of such injunction; and

(2) for purposes of paragraph (1), if a trust described in subsection (g)(2)(B)(i) is subject to a court order on the date of the enactment of this Act staying such trust from settling or paying further claims –

(A) the requirements of subsection (g)(2)(B)(ii)(V) shall not apply with respect to such trust until such stay is lifted or dissolved; and

(B) if such trust meets such requirements on the date such stay is lifted or dissolved, such trust shall be considered to have met such requirements continuously from the date of the enactment of this Act.

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**11 U.S.C. § 727. Discharge**

(a) The court shall grant the debtor a discharge, unless –

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any

recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case –

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy act, in a case commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least –

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

**(d)** On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

**(1)** such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

**(2)** the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

**(3)** the debtor committed an act specified in subsection (a)(6) of this section.

**(e)** The trustee, a creditor, or the United States trustee may request a revocation of a discharge –

**(1)** under subsection (d)(1) of this section within one year after such discharge is granted; or

**(2)** under subsection (d)(2) or (d)(3) of this section before the later of –

**(A)** one year after the granting of such discharge; and

**(B)** the date the case is closed.

**28 U.S.C. § 1651. Writs**

**(a)** The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

**(b)** An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF RHODE ISLAND**

| | |
|---|---|
| CHERYL BESSETTE and FRANCISCO GONZALEZ, for themselves and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>AVCO FINANCIAL SERVICES, INC.; AVCO FINANCIAL SERVICES MANAGEMENT COMPANY; AVCO FINANCIAL SERVICES OF RHODE ISLAND, INC.; AVCO FINANCIAL SERVICES OF COLORADO, INC.; and JOHN DOES 1-10,<br><br>Defendants. | CA 97487L<br>Judge Lagueux<br>JURY DEMANDED |

**SECOND AMENDED COMPLAINT – CLASS ACTION**

**INTRODUCTION**

1. This action seeks classwide relief for defendants' practice of disregarding the provisions of the Bankruptcy Code relating to the collection and attempted collection of discharged debts and the filing of reaffirmation agreements, 11 U.S.C. § 524. Defendants' conduct involves the intentional demand for and collection of payments on discharged debts, based on agreements which defendants

know to be void and unenforceable. Plaintiffs seek injunctive, monetary and declaratory relief for the class they represent.

## JURISDICTION

2. The court has jurisdiction to grant the relief sought by plaintiffs pursuant to 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1334 (bankruptcy laws), 28 U.S.C. § 1337 (interstate commerce), 18 U.S.C. § 1964 (RICO), and 28 U.S.C. § 1367 (supplemental jurisdiction). Venue in this District is proper in that defendants transact business here and in that the conduct complained of occurred here.

## PARTIES

3. Plaintiff Cheryl Bessette is an individual who resides in the District of Rhode Island and was damaged by defendants' wrongful course of conduct as alleged herein.

4. Plaintiff Francisco Gonzalez is an individual who was damaged by defendants' wrongful course of conduct as alleged herein.

5. Avco Financial Services, Inc. ("AFS") is a Delaware corporation with its principal place of business located at 600 Anton Blvd., P.O. Box 5011, Costa Mesa, CA 92628.

6. AFS is a 100% owned subsidiary of Textron, Inc. ("Textron"), a Delaware corporation with its principal place of business located at 40 Westminster Street, Providence, RI 02903.

7. Textron is a global, multi-industry company with operations in six business segments: Aircraft, Automotive, Industrial, Systems and Components, Finance and Insurance.

8. The finance segment of Textron's business is conducted on its behalf by AFS.

9. According to its annual report on SEC Form 10-K, as of December 31, 1996, AFS operated 1,235 finance offices located in all states of the United States (except Arkansas, Kansas, Mississippi, Oklahoma and Vermont), the Commonwealth of Puerto Rico, the Virgin Islands, all Canadian provinces and the Yukon Territory, six Australian states, and the Australian Capital Territory, Hong Kong, New Zealand, Spain and the United Kingdom. According to its report on SEC Form 10-Q, as of June 30, 1997, AFS had over $7.5 billion in finance receivables. Approximately 57% of the receivables were from United States customers.

10. AFS conducts this consumer finance business through various subsidiaries, including Avco Financial Services of Rhode Island, Inc. ("AFS-RI"), and Avco Financial Services of Colorado, Inc. ("AFS-CO").

11. Avco Financial Services Management Company ("AFS Management") is a subsidiary of AFS which provides management services to AFS and its United States subsidiaries.

12. The subsidiaries have numerous common officers and directors. For example:

a. The president of both AFS-RI and AFS-CO is Mark A. Schimbor, who is also executive vice president and director of AFS.

b. Herbert Smith is the Executive Vice President of AFS Management, Corporate Secretary of AFS Management, Director, Corporate Secretary and Executive Vice President of AFS, Director of Newport Management Corporation and Director, Corporate Secretary and Executive Vice President of AFS Rhode Island and AFS Colorado, and all of the other AFS branch offices in the United States. He also serves as General Counsel to AFS, AFS Management and their subsidiaries, and maintains the minutes and stock books for both AFS Rhode Island and AFS Colorado.

c. Warren Lyons is the Chairman of the Board and a Director of AFS, AFS Management and serves on the board of the following AFS subsidiaries: Balboa Insurance Company, Balboa Life Insurance Company, Merit Plan Insurance Company, Family Insurance Company.

d. Gary Fite is the controller and an executive vice president and director of AFS and AFS Management, a Director of AFS Rhode Island, and an executive vice president and director of all of the other AFS branch offices in the United States.

e. Gene Shutt is a director and executive vice president of AFS and AFS Management, and is the president of most of AFS's finance subsidiaries in the United States.

13. AFS-RI is a Rhode Island corporation with its principal place of business located at 600 Anton Blvd.,

Costa Mesa, CA 92626. It is registered to do business in Rhode Island. Its registered agent and office are U. S. Corporation Company, 170 Westminster Street, Providence, RI 02903. AFS Rhode Island has no employees; its employees are all provided and paid by AFS Management. All of the board meetings of AFS Rhode Island are conducted at AFS's California headquarters.

14. AFS-CO is a Colorado corporation with its principal place of business located at 600 Anton Blvd., Costa Mesa, CA 92626. It is registered to do business in Rhode Island. Its registered agent and office are Prentice Hall Corporation System, 170 Westminster Street, Suite 900, Providence, RI 02903. AFS Colorado has no employees; its employees are all provided and paid by AFS Management. All of the board meetings of AFS Colorado are conducted at AFS's California headquarters.

15. All of the operating capital of AFS Rhode Island and AFS Colorado comes either directly or indirectly from AFS.

16. Defendants John Does 1-10 are individuals employed by AFS and/or any of its subsidiaries in charge of securing reaffirmation agreements.

17. All receivables and income generated by AFS' subsidiaries are reported as assets and income on the financial statements of AFS. All receivables and income of AFS are reported as assets and income on the financial statements of Textron. The money raised from public investors by AFS and Textron on the strength of those financial statements is, in turn, used to support the finance operations of Textron, which are conducted by AFS.

18. AFS has no employees in the United States (other than in Puerto Rico), and serves no function in the United States other than to generate and maintain the consolidated financial statements of AFS and its subsidiaries, to perform other periodic reporting requirements of the SEC, and to lend money to its subsidiaries. AFS is also a shareholder of its subsidiaries.

19. AFS Management provides various services to AFS and its consumer finance subsidiaries including, but not limited to accounting, legal, human resources and training services. AFS Management is a wholly owned subsidiary of AFS.

20. a SUBSIDIARY OF ANOTHER ONE OF AFS'S subsidiaries, Newport Management Corporation, provides computer services and a centralized processing system for AFS, AFS Management and AFS's consumer finance subsidiaries.

21. If a customer of AFS Rhode Island, AFS Colorado or any other AFS consumer finance subsidiary moves, that account is transferred in defendants' books to the AFS branch in the customer's new home state.

22. AFS, AFS Management, AFS Rhode Island, AFS Colorado and the other AFS consumer finance subsidiaries constitute a single economic entity.

## FACTS RELATING TO AFS' BUSINESS

23. Many AFS customers do not repay their debts, in part as a result of bankruptcies. According to AFS' annual report on SEC Form 10-K, as of December 31, 1996, the allowance for losses was $218.4 million. On

information and belief, based on general industry experience, at least 30% of AFS' losses are from customers who seek relief under the Bankruptcy Code.

24. AFS aggressively seeks to recover written-off accounts. According to AFS' annual report on SEC Form 10-K dated December 31, 1996, during each of the years 1992-1996, AFS recovered between $26 million and $35 million in receivables which had previously been written off.

25. AFS Management creates the forms that subsidiaries such as AFS Rhode Island and AFS Colorado are to use to collect debts from delinquent customers, including customers who have filed bankruptcies. AFS Management also provides training on how to deal with such customers.

## FACTS RELATING TO PLAINTIFF CHERYL A. BESSETTE

26. On August 7, 1995, plaintiff Cheryl A. Bessette and her husband filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the District of Rhode Island. *In re Bessette*, 95-11908 (Bankr. D.R.I.).

27. In the bankruptcy proceeding, Bessette listed an obligation for a debt to AFS-RI. The obligation arose from a Cardi's Furniture revolving charge account, on which the creditor was AFS-RI. A copy of the credit application is attached as *Exhibit A*. Bessette had purchased furniture for her home on the account.

28. On or about September 20, 1995, plaintiff Bessette executed the agreement attached as *Exhibit B*.

The document had been transmitted by one of the defendants by mail shortly prior to that date.

29. This agreement purportedly required Bessette to pay $1500 plus interest at 12% at the rate of $100 per month. Payments were to be made payable to "AVCO Financial Services" and sent to an address in Colorado that belongs to AFS-CO.

30. This agreement was not filed with the court.

31. The agreement was prepared on a printed form.

32. The form on its face fails to comply with 11 U.S.C. § 524, in that it does not contain "a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankrupty law, or under any agreement not in accordance with the provisions of this subsection [524(c)]", as required for all reaffirmation agreements relating to bankruptcy proceedings filed after Oct. 21, 1994.

33. In addition, the form purports to provide that if the debtor rescinds it, any payments made will be retained by the creditor. This is unauthorized and illegal.

34. The provision that if the debtor exercised his or her right to rescind defendants would retain all payments made prior to rescission is illegal. It is illegal because 11 U.S.C. § 524(c) provides that "An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable . . . only if . . . (4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court,

whichever occurs later, by giving notice of rescission to the holder of such claim. . . . " If the debtor has given notice of rescission, the underlying debt is discharged, any act to collect the debt is forbidden by the automatic stay (11 U.S.C. § 362) prior to discharge and the discharge order (11 U.S.C. § 524) afterwards, and there is no enforceable reaffirmation agreement. Therefore, defendants are collecting money on a pre-petition debt in violation of the automatic stay or discharge order. Furthermore, the representation that defendants will keep payments made if the reaffirmation is rescinded constitutes an unlawful interference with the debtor's right to rescind.

35. Defendants did not intend to file this agreement with the court.

36. On or about November 2, 1995, the Bankruptcy Court issued a discharge order pursuant to 11 U.S.C. § 524, discharging Bessette from all dischargeable debts, including the AFS obligation.

37. Plaintiff Bessette has made her monthly payments to defendants as directed. Copies of her checks are attached as *Exhibit C*.

38. The checks were deposited into an account in the name of AFS.

## FACTS RELATING TO PLAINTIFF FRANCISCO GONZALEZ

39. On November 13, 1996, plaintiff Francisco T. Gonzalez and his wife Maria A. Gonzalez filed a joint

voluntary petition for relief under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court Eastern District of California Modesto Division.

40. Plaintiff Gonzalez was not represented by counsel in his bankruptcy proceeding.

41. In the bankruptcy proceeding, plaintiff Gonzalez listed an obligation for debt to AFS of $411 for credit extended to finance the purchase of items for personal, family or household purposes. A copy of the bankruptcy file of plaintiff Gonzalez is attached as *Exhibit D.*

42. The bankruptcy petition of plaintiff Gonzalez indicated that he had a monthly income of approximately $704, monthly expenses of $825 and two dependent children. *See, Exhibit D.*

43. On or about December 20, 1996, plaintiff Gonzalez executed the agreement attached as *Exhibit E.* This agreement required plaintiff to pay AFS $20 per month against his purported outstanding debt to AFS (an annual interest rate of 21.79%).

44. On February 20, 1997, the Bankruptcy Court entered an order discharging plaintiff Gonzalez of all dischargeable debts, including the AFS debt.

45. Plaintiff Gonzalez has made payments pursuant the agreement with AFS executed on December 20, 1996 which have totaled approximately $120.

46. Defendants neither filed, nor intended to file, this agreement with the Bankruptcy Court.

47. This agreement was prepared on a printed form.

48. This agreement was invalid, and not enforceable, because AFS failed to comply with Bankruptcy Code § 524(c) which requires ceditors to file such agreements with the Bankruptcy Court.

49. This agreement falsely represented that it was legally binding on plaintiff Gonzalez by stating that: **"THIS AGREEMENT SHALL BE BINDING ON EACH PARTY AS A VALID CONTRACT ON EACH PARTY WHICH, IN THE EVENT OF DEFAULT, MAY BE ENFORCED BY THE CREDITOR BY JUDGMENT OR OTHER LEGAL MEANS."** *See Exhibit E.*

50. In addition, the form purports to provide that if the debtor rescinds it, any payments made will be retained by the creditor. As discussed in paragraph 25 above, this is unauthorized and illegal.

51. If this agreement had been filed with the Bankruptcy Court as required, the Bankruptcy Court pursuant to § 524(d) of the Bankruptcy Code would have held a hearing at which plaintiff Gonzalez would have been informed that: (a) this agreement was not required pursuant to bankruptcy or nonbankruptcy law; and (b) of the legal effect of the agreement and the consequences of default. Moreover, the agreement would have been permitted only if the Bankruptcy Court had determined, pursuant to § 524(d)(2) and (c)(6), that: (a) this agreement was in the debtor's best interest; and (b) this agreement did not imposing [sic] an undue hardship on the debtor. A hearing pursuant to § 524(d) of the Bankruptcy Code is required for all debtor's who are not represented by counsel.

52. It is unlikely that the Bankruptcy Court would have approved this agreement, because the schedule of income and expenses submitted by plaintiff Gonzalez did not show any excess income with which to pay the debt he was reaffirming.

## OTHER VICTIMS

## NANCY PELLOGRINO, F/K/A NANCY ROSI

53. On September 18, 1992, Nancy Pellogrino, then known as Nancy Rosi, filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code in the District of Rhode Island. *In re Rosi,* 92-12708 (Bankr. D.R.I.).

54. In the bankruptcy proceeding, Ms. Rosi listed an obligation to AFS RI for credit extended for personal, family or household purposes.

55. On December 28, 1992, the Bankruptcy Court entered an order discharging Ms. Rosi of all dischargeable debts, including the AFS RI debt.

56. Subsequent to the entry of the discharge order, one or more of the defendants sent Ms. Rosi correspondence claiming that Ms. Rosi owed an "obligation" of $643.34. A copy is attached as *Exhibit F.* The letter comes from AFS-CO, although it pertained to a debt nominally owed to AFS-RI.

57. In the correspondence, defendants made "demand" that Ms. Rosi either "reaffirm the entire debt," "redeem the property," or return the collateral. The correspondence also threatened to refer the matter to an attorney if Ms. Rosi failed to comply.

58. Defendants sent Ms. Rosi a reaffirmation agreement, attached as *Exhibit G*, and a redemption agreement, attached as *Exhibit H*. Both were dated January 19, 1993.

59. In response to defendants' actions, Ms. Rosi paid $250 to defendants on or about January 22, 1993. A copy of Ms. Rosi's money order is attached as *Exhibit I*.

60. On or about January 25, 1993, defendants sent a letter to Ms. Rosi stating that the $250 payment settled Ms. Rosi's account in full. A copy is attached as *Exhibit J*.

## POLICIES AND PRACTICES COMPLAINED OF

61. Over the course of at least the last several years, and on information and belief a substantially longer period, defendants AFS, AFS Management AFS-RI, AFS-CO and John Does 1-10 have obtained from a significant, but as yet undetermined, number of bankruptcy debtors purported "reaffirmation agreements" subject to the provisions of 11 U.S.C. § 524(c).

62. On information and belief, defendants intended to and did withhold the existence of numerous such agreements from the Court's knowledge, simply by not filing the agreements as required by 11 U.S.C. § 524(c)(3).

63. Defendants derived substantial profits from the undisclosed "reaffirmation agreement" scheme. These wrongful profits include but are not limited to the monies paid by debtors pursuant to such illegal agreements and are enhanced daily as debtors continue to pay the defendants under such agreements.

## APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

64. The automatic stay provision of the Bankruptcy Code provides that the filing of a petition for relief under the Bankruptcy Code precludes, inter alia, any act by a creditor to obtain possession of property of the estate, or to collect, assess, or recover a claim against the debtor that arose prior to that filing. 11 U.S.C. §§ 362(a)(3) and (a)(6).

65. A bankruptcy discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor. . . . " 11 U.S.C. § 524(a)(1).

66. The Bankruptcy Code provides that an agreement to reaffirm a pre-petition debt is only enforceable if:

a. The agreement was made prior to the granting of the discharge (11) U.S.C. § 524(c)(1));

b. The agreement "contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim" (11 U.S.C. § 524(c)(2));

c. The agreement contains "a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection [524(c)]" (added by P.L. 103-394 for cases filed after Oct. 21, 1994);

d. The agreement has been filed with the court;

e. If the debtor is represented by an attorney, the agreement must be accompanied by a declaration or an affidavit of the attorney stating that the agreement is voluntary, fully informed and does not impose an undue hardship on the debtor or the debtor's family and is in the best interest of the debtor (11 U.S.C. §524(c)(3)); and

f. If the debtor is not represented by an attorney during the course of negotiating the agreement, the agreement must be approved by the court, as not imposing an undue hardship on the debtor or a dependent of the debtor and in the best interest of the debtor.

67. Prior to 1984, all reaffirmation agreements had to be approved by the Court. From 1984, the agreements only had to be affirmatively approved if the debtor was not represented by counsel. However, all agreements continued to be required to be filed with the Court, and were subject to scrutiny and disapproval by the Court. A number of bankruptcy judges reviewed filed reaffirmation agreements, either generally or on a spot basis, and would summon the parties if the agreements appeared improvident in light of the income and expense information in the petition and schedules, and in some cases if the reaffirmation was of unsecured debt.

## CLASS ALLEGATIONS

68. Plaintiffs bring this action on behalf of a class and subclass, pursuant to Fed.R.Civ.P. 23(a) and (b)(2) and (b)(3).

69. The class consists of all individuals:

a. who filed a petition for relief under the Bankruptcy Code;

b. who listed AFS or any subsidiary of AFS as a creditor, against whom any of these companies has filed a claim, or who owe or owed a debt or alleged debt to any of these companies;

c. who, subsequent to the filing of the bankruptcy petition, executed an agreement purporting to reaffirm such debt;

d. where either;

(1) such agreement has not been filed with the Bankruptcy Court in accordance with 11 U.S.C. §524(c)(3), or

(2) the bankruptcy proceeding was filed after Oct. 21, 1994 and the agreement does not contain "a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection [524(c)]," or

(3) the agreement was signed after the discharge of the debtor; or

(4) the agreement purports to provide that if the debtor rescinds it, any payments made will be retained by the creditor; and

e. Either:

(1) the agreement was signed on or after a date 10 years prior to the filing of this action; or

(2) a payment pursuant to the agreement was made on or after a date 10 years prior to the filing of this action; or

(3) the records of the defendants purport to show that amounts are due and owing under the agreement.

70. The subclass includes all individuals who made payments to defendants.

71. Based on the statistics in defendants' SEC filings, the members of the class and subclass are so numerous that joinder of all members is impracticable.

72. There are questions of law and fact which are common to all members of the class and subclass, which questions predominate over any question affecting only individual class members.

73. The principal common issues are whether defendants, by soliciting as well as inducing bankruptcy debtors to execute purported reaffirmation agreements subject to 11 U.S.C. §524(c), without complying with the provisions of the Bankruptcy Code governing such agreements, by collecting monies pursuant to such agreements, and by otherwise enforcing or attempting to enforce such agreements, have violated:

a. Section 524 of the Bankruptcy Code;

b. The statutory discharge injunction;

c. RICO.

74. Two additional common issues are (a) whether plaintiffs and the class members are entitled to an order

declaring that these practices as described above render the reaffirmation agreements void and unenforceable because they violate the express filing requirement of 11 U.S.C. § 524(c)(3) and/or violate public policy, in that the agreements arose from willful violations of the Bankruptcy Code; and (b) the appropriate amount of damages and other relief to be granted to plaintiffs and class members.

75. The only individual questions concern the identification of class members and the computation of the relief to be afforded each class member and can be determined by a ministerial examination of the relevant files.

76. Plaintiffs' claims are typical of the claims of the class members. All are based on the same legal and remedial theories.

77. Plaintiffs will fairly and adequately protect the interests of all class members in the prosecution of this action and in the administration of all matters relating to claims stated herein. Plaintiffs are similarly situated with the members of the class plaintiffs seek to represent. Plaintiffs have retained counsel experienced in handling class action suits involving unfair business practices and consumer credit law. Neither the named plaintiffs nor plaintiffs' counsel have any interest which might cause them not to vigorously pursue this action.

78. Certification under Fed.R.Civ.P. 23(b)(2) is appropriate. Defendants have acted in a uniform manner towards the class members, by attempting to collect discharged debts. Final injunctive relief and/or declaratory relief is appropriate to remedy such action.

79. Certification under Fed.R.Civ.P. 23(b)(3) is also appropriate. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, in that:

a. The individual class members are not aware that they have been wronged and are thus unable to prosecute individual actions.

b. Concentration of the litigation concerning this matter in this Court is desirable.

c. The claims of the representative plaintiffs are typical of the claims of the class members.

d. A failure of justice will result from the absence of a class action. Persons who have filed bankruptcy are unlikely to be able to maintain individual actions against large corporations such as defendants.

c. The classes are of moderate size and the difficulties likely to be encountered in the management of a class action are not great.

## LIABILITY OF AFS AND AFS MANAGEMENT

80. AFS and AFS Management are liable for the conduct of AFS Rhode Island and AFS Colorado because AFS Rhode Island and AFS Colorado are adjuncts of AFS and AFS Management that are wholly funded and operated by AFS and AFS Management. AFS Management sets the policies and procedures of AFS Rhode Island and AFS Colorado (including polices with respect to the collection of debts from consumers who have filed for bankruptcy protection), and provides employees to run both entities. Many of the directors and officers of AFS Rhode

Island and AFS Colorado are also directors and officers of AFS and AFS Management.

81. AFS and AFS Management controlled and used AFS Rhode Island and AFS Colorado to carry out their fraudulent scheme to collect money from bankrupt consumers using unlawful reaffirmation agreements. AFS Management drafted the forms used by AFS Rhode Island and AFS Colorado to collect debts from bankrupt consumers, provided employees to AFS Rhode Island and AFS Colorado to carry out its policies and provided training to those employees in how to carry out its policies and procedures with respect to the collection of debts. AFS provided, either directly or indirectly, all of the operating capital used by AFS Rhode Island and AFS Colorado. Another subsidiary of AFS provided a computer system and central processing system for Rhode Island and AFS Colorado to use in processing customer payments and tracking the status [sic] their customers' accounts.

82. AFS Rhode Island and AFS Colorado represent themselves to consumers as "AFS" or "Avco Financial Services," and directed that payments on the offending reaffirmation agreements be made out and sent to Avco Financial Services.

**COUNT I – WILLFUL VIOLATION OF 11 U.S.C. §524(c)**

83. Plaintiffs incorporate ¶¶ 1-82.

84. by ignoring and willfully violating specific Bankruptcy Code provisions governing and limiting the

permissible post-petition reaffirmation of debt, defendants violated 11 U.S.C. § 524(c).

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the class and against defendants as follows:

a. Ordering defendants, defendants' agents and employees, and all other persons in active concert and participation with defendants to immediately cease attempts to collect under such improperly obtained and unenforceable agreements, and to refund to debtors all payments made;

b. Assessing exemplary or punitive damages against defendants in an amount which the Court determines to be appropriate for defendants' willful violations of the Bankruptcy Code;

c. Awarding plaintiffs reasonable attorney's fees and costs; and

d. Granting such other relief as the Court deems appropriate and just.

## COUNT II – WILLFUL VIOLATION OF THE DISCHARGE ORDER

85. Plaintiffs incorporate ¶¶ 1-82.

86. By seeking to collect debts plaintiffs and the class members had incurred prior to the filing of their bankruptcy petitions, defendants violated the discharge injunction, Bankruptcy Code § 524(a)(2).

87. The use of an invalid "reaffirmatoin agreement" to induce payment of a discharged debt is an act to collect the debt.

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the class and against defendants as follows:

a. Ordering defendants, defendants' agents and employees, and all other persons in active concert and participation with defendants to immediately cease attempts to collect under such improperly obtained and unenforceable reaffirmation agreements, and to refund to debtors all payments made;

b. Assessing exemplary or punitive damages against defendants in an amount which the Court determines to be appropriate for defendants' willful violations of the Bankruptcy Code;

c. Awarding plaintiffs reasonable attorney's fees and costs; and

d. Granting such other relief as the Court deems appropriate and just.

## COUNT III – WILLFUL VIOLATION OF THE AUTOMATIC STAY

88. Plaintiffs incorporate ¶¶ 1-82.

89. By misrepresenting the rights of the plaintiffs and class members in connection with obtaining reaffirmation agreements, and by applying payments made under the above-described agreements to satisfy the debts plaintiff [sic] and class members had incurred before the

filing of their bankruptcy petitions, defendants violated the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362.

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the class and against defendants as follows:

a. Ordering defendants, their agents and employees, and all other persons in active concert and participation with them to immediately cease attempts to collect under such improperly obtained and unenforceable agreements, and to refund to debtors all payments made;

b. Assessing exemplary or punitive damages against defendants in an amount which the Court determines to be appropriate for defendants' willful violations of the Bankruptcy Code;

c. Awarding plaintiffs reasonable attorney's fees and costs; and

d. Granting such other relief as the Court deems appropriate and just.

## COUNT IV – RICO

90. Plaintiffs incorporate ¶¶ 1-82. This claim is brought against AFS Management.

91. AFS Management is a "person" as defined in 18 U.S.C. § 1961.

92. Textron is an "enterprise" as defined in 18 U.S.C. § 1961(4). Its affairs affect interstate commerce, in that it conducts business throughout the United States.

93. Textron delegated to AFS Management the conduct of certain aspects of its business, namely, the business of consumer finance. The profits from the business conducted by AFS Management were returned to Textron. Textron also listed the revenues from that business, including revenues obtained from the use of the illegal reaffirmation agreements, on the financial statements issued by Textron and used by Textron to raise money from investors.

94. The mails were used as follows in furtherance of the activities complained of:

a. By defendants to send reaffirmation agreements and related correspondence to debtors.

b. To receive money from debtors, including plaintiffs and Ms. Rosi.

c. To disseminate loan reaffirmation agreements to AFS offices.

95. AFS Management conducted the business activities for which it was given responsibility through repeated acts of mail fraud, as described above.

96. The acts of mail fraud affected a large number of debtors and persisted over a substantial period of time, thereby constituting a "pattern."

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the class and against AFS Management as follows:

a. For treble damages;

b. Awarding plaintiffs reasonable attorney's fees and costs; and

c. Granting such other relief as the Court deems appropriate and just.

## COUNT V – RICO

97. Plaintiffs incorporate ¶¶ 1-82. This claim is brought against AFS Management.

98. AFS Management is a "person" as defined in 18 U.S.C. § 1961.

99. AFS and its consumer finance branch offices ("the AFS enterprise") are an "enterprise" as defined in 18 U.S.C. § 1961(4). Its affairs affect interstate commerce, in that it conducts business throughout the United States.

100. The AFS enterprise delegated to AFS Management the conduct of certain aspects of its business, namely, the business of consumer finance. The profits from the business conducted by AFS Management were returned to AFS. AFS also listed the revenues from that business, including revenues obtained from the use of the illegal reaffirmation agreements, on the financial statements issued by AFS and used by AFS to raise money from investors.

101. The mails were used as follows in furtherance of the activities complained of:

a. By defendants to send reaffirmation agreements and related correspondence to debtors.

b. To receive money from debtors, including plaintiffs and Ms. Rosi.

c. To disseminate loan reaffirmation agreements to AFS offices.

102. AFS Managements conducted the business activities for which it was given responsibility through repeated acts of mail fraud, as described above.

103. The acts of mail fraud affected a large number of debtors and persisted over a substantial period of time, thereby constituting a "pattern."

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the class and against AFS Management as follows:

a. For treble damages;

b. Awarding plaintiffs reasonable attorney's fees and costs; and

c. Granting such other relief as the Court deems appropriate and just.

## COUNT VI – RICO

104. Plaintiffs incorporate ¶¶ 1-82. This claim is brought against John Does only.

105. Each of the Does is a "person" as defined in 18 U.S.C. § 1961.

106. AFS and Textron are each an "enterprise" as defined in 18 U.S.C. § 1961(4). Their affairs affect interstate commerce, in that they conduct business throughout the United States.

107. The mails were used as follows:

a. To send reaffirmation agreements and related correspondence to debtors.

b. To receive money from debtors, including plaintiffs and Ms. Rosi.

c. To disseminate loan reaffirmation agreements to AFS offices.

108. The Does, as the responsible agents of AFS and its subsidiaries, conducted the business activities of AFS and Textron entrusted to them through repeated acts of mail fraud, as described above.

109. The acts of mail fraud affected a large number of debtors and persisted over a substantial period of time, thereby constituting a "pattern."

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the class and against the Does as follows:

a. For treble damages;

b. Awarding plaintiffs reasonable attorney's fees and costs; and

c. Granting such other relief as the Court deems appropriate and just.

**COUNT VII – RESTITUTION/UNJUST ENRICHMENT**

110. Plaintiffs incorporate ¶¶ 1-82. This claim is brought on behalf of the subclass against all defendants.

111. Defendants obtained money from plaintiffs and the class members in a manner contrary to equity and good conscience and under circumstances constituting unjust enrichment.

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs and the subclass and against defendants as follows:

a. Ordering defendants and their agents and employees, and all other persons in active concert and participation with them to immediately refund to debtors all payments made under such improperly obtained and unenforceable agreements;

b. Awarding plaintiffs costs; and

c. Granting such other relief as the Court deems appropriate and just.

Respectfully submitted,

Christopher M. Lefebvre
LAW OFFICES OF CLAUDE LEFEBVRE & SONS
Two Dexter Street
Pawtucket, RI 02860
(401) 728-6060
(401) 728-6534 (FAX)
Bar No. 4019

Daniel A. Edelman
Cathleen M. Combs
James O. Latturner
EDELMAN & COMBS
135 S. LaSalle Street
Suite 2040
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (FAX)

Jules Brody
STULL, STULL & BRODY
5 East 45th Street
New York, NY 10017
(212) 687-7230
(212) 490-2022 (FAX)

Abraham Camhy
LAW OFFICES OF
ABRAHAM CAMHY
345 Franklin Street
San Francisco, CA 94102
(415) 241-9093
(415) 241-9094 (FAX)

**JURY DEMAND**

Plaintiffs demand trial by jury.

Christopher M. Lefebvre

## EXHIBIT A

PRE-SALE

# CUSTOMER CREDIT APPLICATION

799
0000650032

By signature below, I (we) apply to CARDI'S FURNITURE (seller) for a retail charge account, known as CARDI'S Revolving Charge Account. I (we) understand that the application for credit will be submitted to AVCO Financial Services of Rhode Island, Inc. ("Avco") and the account will be assigned to Avco upon acceptance of my (our) application and that issuance of CARDI'S Revolving Charge Identification Cards and use of CARDI'S Revolving Charge Accounts is contingent upon approval of my (our) credit by Avco. After credit approval, I (we) understand Avco will extend credit under the terms of the agreement on the reverse side of this application. I (we) certify that the information in this application is correct to the best of my (our) knowledge. NOTICE: Whether or not married, you have the right to apply for credit separately from or jointly with your spouse or another person. If individual credit is desired, omit the information in Co-Applicant Section. I apply for ☒ Joint Credit with my spouse or another person ☐ Individual Credit in my name only. Have you ever filed for bankruptcy? ☐ Yes ☒ No

| CREDIT LIMIT | PURCHASE AMOUNT | DOWN PAYMENT | FINANCE AMOUNT | INVOICE NUMBER | SALES PERSON |
|---|---|---|---|---|---|
| $ 3500 A856 | $ 2015.66 | $ 0 | $ 2015.66 | 122640551EXU/E4/05 | NFP |

### APPLICANT

| LAST NAME | FIRST | M.I. | DRIVER'S LICENSE # |
|---|---|---|---|
| Bessette | Cheryl | A | 7912127 |

| BIRTHDATE | NO. OF DEP. | SOCIAL SECURITY NO. | HOME PHONE ☐ NEAR BY |
|---|---|---|---|
| 1-8-63 | 2 | 035-48-9472 | (401) 294-9891 |

ADDRESS / STREET # / APT.# — 115 DAWN MARK CT — ☐ MARRIED ☐ UNMARRIED ☐ SEPARATED

CITY — N. Kingstown — STATE — RI — ZIP — 02852 — HOW LONG — 1 YR. 2 MO.

LANDLORD OR MORTGAGE HOLDER AND ADDRESS — GE Capital — RENT/MTG. PMT. — 910.00

BUY/OWN ☐ HOME ☐ MOBILE HOME — RENT ☐ FURNISHED ☐ UNFURNISHED ☐ OTHER — BAL. OWED 1ST MTG.

PREVIOUS ADDRESS, IF AT PRESENT ADDRESS LESS THAN 1 YEAR — 11030 Chalkstone Ave.

| CURRENT EMPLOYER | OCCUPATION | HOW LONG |
|---|---|---|
| St. Joseph Hospital | phlebotomist | 4 YR. MO. |

| ADDRESS OR LOCATION | PHONE NO. | WEEKLY PAY (Before Taxes) |
|---|---|---|
| 200 High Service Ave | (401) 456-3012 | 865.00 |

PREVIOUS EMPLOYER, IF CURRENT LESS THAN 1 YEAR HOW LONG — YR. MO.

ADDRESS OR LOCATION — PHONE NO. ( )

### CO-APPLICANT

| LAST NAME | FIRST | M.I. | BIRTHDATE |
|---|---|---|---|
| Bessette | Joseph | F | 4-24-63 |

☐ MARRIED ☐ UNMARRIED ☐ SEPARATED — DRIVER'S LICENSE — SOCIAL SECURITY NO. 036-48-1460

CURRENT EMPLOYER — Local 271 — OCCUPATION — Laborer — HOW LONG — 9 YR. MO.

ADDRESS OR LOCATION — 206 South Main St — PHONE — WEEKLY PAY (Before Tax) — 1142.00

### APPLICANT AND/OR CO-APPLICANT

OTHER INCOME: IMPORTANT: INCOME FROM ALIMONY, CHILD SUPPORT OR SEPARATE MAINTENANCE PAYMENTS NEED NOT BE REVEALED IF YOU DO NOT CHOOSE TO RELY UPON SUCH INCOME IN APPLYING FOR CREDIT

| TYPE OF OTHER INCOME | MONTHLY AMT |
|---|---|
| | $ |
| RENTAL INCOME | MONTHLY AMOUNT $ |
| SPOUSE INCOME (Only if you want this income considered as a source for repaying the loan) | WEEKLY PAY (Before Tax) |
| SPOUSE EMPLOYER | PHONE NO. ( ) |

### BANK AND CREDIT REFERENCES

CHECKING ☐ YES ☐ NO — SAVINGS ☐ YES ☒ NO — BANK NAME(S) Fleet

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| DO YOU HAVE: VISA/MASTER CARD | ☐ YES | ☐ NO | AMEX/DINERS/CARTE BLANCHE | ☐ YES | ☐ NO | OTHER FINANCE COMPANIES | ☐ YES ☐ NO |
| DEPARTMENT STORE CARD | ☒ YES | ☐ NO | DEPARTMENT STORE CARD | ☐ YES | ☐ NO | | |

**NOTICE TO BUYER: DO NOT SIGN THIS AGREEMENT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COMPLETELY FILLED-IN COPY OF THIS AGREEMENT.**

BY SIGNING BELOW: 1. OBLIGATION UNDER AGREEMENT: You agree to be responsible under the terms and conditions of the Revolving Charge Account Agreement, on the reverse side of this Application. 2. REQUEST FOR CARDI'S FURNITURE REVOLVING IDENTIFICATION CARD: You specifically request and authorize AVCO to issue, upon approval of your credit, and acceptance of this Agreement, a CARDI'S Revolving Identification Card and any renewals of the card which from time to time may be issued. 3. RECEIPT OF COPY OF AGREEMENT: You acknowledge receipt of a copy of the REVOLVING CHARGE ACCOUNT AGREEMENT which you will retain for your records.

Cheryl A. Bessette — SIGNATURE OF APPLICANT

Joseph Bessette — SIGNATURE OF CO-APPLICANT

12/26/94 — DATE

OFFIC OPY

BEST AVAILABLE COPY

## REVOLVING CHARGE ACCOUNT AGREEMENT

## TERMS AND CONDITIONS

Buyer agrees that Holder may debit this account for any retail credit purchases from Seller which are evidenced by a sales slip or other memorandum of sales signed by Buyer (or prepared at Buyer's direction if ordered by mail or telephone) and for an amount equal to the unpaid balance exclusive of unpaid FINANCE CHARGES, with respect to a previously existing retail credit obligation due Seller or its assignee, and Buyer agrees to pay to Holder for the obligations debited to the account in the manner provided in this Agreement.

Holder shall send Buyer a statement monthly showing the transactions on the account, the new balance and other pertinent information. Buyer has the right to pay the full new balance or any part thereof, except the Buyer agrees to pay at least the minimum amount due each month as shown on each month's statement.

A FINANCE CHARGE at the rate of .057534% per day for each day in the billing cycle (ANNUAL PERCENTAGE RATE: 21%) will be assessed on the average daily balance of the account. Connecticut residents will be charged 1.2417% per month which is an ANNUAL PERCENTAGE RATE of 14.9%.

The average daily balance of Buyer's account is determined by first adding together the balance of the account for each day of the billing cycle and then dividing the sum of these balances by the number of days in the billing cycle. Purchases are considered added to the balance of the account on the date of purchase. Payments

and other credits are deducted from the balance on the date they occur.

NO FINANCE CHARGES are incurred during any billing period when the account balance at the beginning of the period is $0. NO FINANCE CHARGES on purchases charged will be incurred on the New Balance Amount shown on Buyer's periodic statement if Buyer pay that amount in full on or before the Payment Due Date shown on the periodic statement.

In Georgia, Hawaii, Minnesota, Mississippi, Nebraska, South Carolina, Washington and West Virginia, prior FINANCE CHARGES not paid during the billing period are subtracted in determining the daily balances.

In Massachusetts, Minnesota, Mississippi, and Montana, new purchases are not added in determining daily balances and do not begin to accrue a FINANCE CHARGE until the start of the following billing period. NO FINANCE CHARGE is assessed on such purchases if they are paid in full on or before the Payment Due Date shown on the periodic statement.

In New Mexico, the balance subject to FINANCE CHARGE is the account balance at the beginning of the billing period. Purchases made in the billing period and payments or credits received during the period are not reflected in this balance. New purchases do not begin to accrue a FINANCE CHARGE until the start of the following period and no FINANCE CHARGE will be assessed on such purchases if they are paid on or before the Payment Due Date shown on the periodic billing statement.

Buyer shall have the option of paying the full balance of all purchase transactions on the account for a period of 90 days from the date the account is established. If Buyer exercises this option, and if the balance of the account is zero on that date all FINANCE CHARGES for such period will be cancelled.

**NO ANNUAL FEE; SEE ABOVE FOR ANNUAL RATE. BUYER MAY PAY THE ENTIRE BALANCE AT ANYTIME WITHOUT INCURRING ANY ADDITIONAL CHARGE.**

The minimum monthly payment for each billing period shall be paid until the balance on the account is paid in full, and shall be: 5% of the outstanding balance on the account or $35.00, whichever amount is greater. If the outstanding balance is less than $35.00, it must be paid in full. Payments of more than the minimum payment amount or additional payments may be made at any time but shall not affect Buyer's obligation to pay succeeding monthly payments so long as any amount is owing on the account. In the event Buyer exceeds the credit limit on the account, Buyer will be required to pay the minimum payment due on the account plus the amount in excess of the credit limit.

Buyer agrees that Holder may make changes in the terms of this Agreement from time to time in accordance with applicable law. However, any such changes shall be preceded by the notice required by applicable state and/or federal law. Any change will be applicable to all outstanding balances as well as future balances, unless otherwise stated, where permitted by applicable law.

In the event of default of any payment for a period of ten (10) days, Buyer agrees to pay a delinquency charge in an amount equal to 5% of such payment or $5.00, whichever is less, and provided that such charge shall be collected not more than once on any payment. The delinquency charge will not be charged to residents of Alabama, Colorado, Connecticut, Delaware, Iowa, Maryland, Massachusetts, Mississippi, Nebraska, North Dakota, North Carolina, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Wisconsin and Wyoming.

If any check Buyer gives Holder is returned by Buyer's bank because of insufficient funds in Buyer's account, Buyer agrees to pay a service charge in the amount permitted by applicable law.

In the event of Buyer's default in making the minimum payment due under this Agreement, Holder may elect to terminate Buyer's credit privileges and declare the full balance immediately due and payable subject to any notice of default and right to cure required by applicable state law.

Buyer agrees to pay all collection costs and reasonable attorney's fees and court costs allowable under applicable law, if the account is sent for collection to an attorney who is not the Holder's salaried employee.

This Agreement constitutes the entire agreement between Buyer and Seller and no oral modifications hereof shall be valid.

Holder shall have the right to increase, reduce or terminate Buyer's credit limit hereunder.

**NOTICE**

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

*In Hawaii – CREDIT SALE CONTRACT; In New York – RETAIL INSTALLMENT CREDIT AGREEMENT; In Oregon – CONSUMER PAPER

Sales slip dated 12-26-94 in the amount of 759.67.

Sales slip dated 12-26-94 in the amount of 1343.91.

**EXHIBIT B**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF

RE: Cheryl Bessette CASE #95-11908
Account 799 2905 0000 65032

REAFFIRMATION AGREEMENT

I. On the date of filing bankruptcy, Debtor(s) was indebted to AVCO FINANCIAL SERVICES (LENDER) as evidenced by a security agreement or sales contract upon which remain an unpaid balance of $ 1500.00.

II. Debtor desires to reaffirm said debt, and agrees to pay Lender the sum of $ 1500.00 at the rate of 12% interest in *monthly* installments of $ 100.00. (1st PAYMENT DUE WITH RETURN OF THIS DOCUMENT).

Payments shall be made to the following:
AVCO Financial Services
3300 S. Parker Rd. Suite 603
Aurora, CO 80014
Attn: Dave Smith

Upon payment in full Debtor shall be released from further liability to Lender, and Lender shall terminate any security interest it may have in the property of Debtor.

THIS REAFFIRMATION AGREEMENT CAN BE RESCINDED AT ANY TIME PRIOR TO DISCHARGE OR WITHIN SIXTY (60) DAYS AFTER IT HAS BEEN FILED WITH THE COURT, WHICH EVER OCCURS LATER, BY SENDING WRITTEN NOTIFICATION TO THE ABOVE NAMED CREDITOR.

If the debtor(s) rescind(s) this agreement, any payments made prior to rescission shall be retained by the Creditor and the debtor(s) agree(s) to immediately turnover to the Creditor the property pledged to the Creditor as collateral.

III. Dated this ___ day _____ 19

Date: Sep 30, 1995

_____
Debtor's Signature

_____
Joint Debtor's Signature

/s/ Dave Smith
Dave Smith/ Avco Financial

DECLARATION OF ATTORNEY

**NELSON F. BRINCKERHOFF**
**Attorney at Law**
**648 [Illegible] POST ROAD**
**NORTH KINGSTOWN RI 02852**

I, _____, the attorney for the debtors in the above mentioned bankruptcy proceeding declare that I represented the Debtors in the negotiation of the foregoing Agreement [illegible] a truly informed and voluntary agreement by the Debtors [illegible] the Agreement doesn't impose an undue hardship on the [illegible] dependants.

/s/ _____
Attorney for Debtor(s)

9/26/95
Date

## EXHIBIT C

Check 113 dated 5-1-96 to AVCO amount of $100

Check 136 dated 6-12-96 to AVCO amount of $100

Check 161 dated 7-20-96 to AVCO amount of $100

Check 182 dated 8-15-96 to AVCO amount of $100

Check 246 dated 10-29-96 to AVCO amount of $100

Check 242 dated 12-22-96 to AVCO amount of $100

Check 287 dated 1-19-97 to AVCO amount of $100

Check 0323 dated 3-5-97 to AVCO amount of $214.44

Check 0?25 dated 2-14-96 to AVCO amount of $100

Check 0753 dated 12-10-95 to AVCO amount of $100

Check 0709 dated 11-10-95 to AVCO amount of $100

Check 0858 dated 3-10-96 to AVCO amount of $100

**EXHIBIT D**

B 104
(Rev. 2/92)
**ADVERSARY PROCEEDING COVER SHEET**
(Instructions on Reverse)

ADVERSARY PROCEEDING NUMBER
(Court Use Only)

| **PLAINTIFFS** | **DEFENDANTS** |
|---|---|
| Francisco Gonzales, on behalf of himself and others similarly situated, | Avco Financial Services, Inc. |
| ATTORNEYS (Firm Name, Address, and Telephone No.)<br>Abraham Camhy<br>345 Franklin ST.<br>San Francisco, CA 94102 | ATTORNEYS (if Known) |

PARTY (Check one box only)

[ ] 1 U.S. PLAINTIFF [ ] 2 U.S. DEFENDANT [X] 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

Class action pursuant to 11 U.S.C. Sec 101 et seq, for violation of 11 U.S.C. Sec. 362 and 524, violation of the automatic stay and post discharge "injunction", state common law fraud and deceit and state common law negligent misrepresentation.

NATURE OF SUIT

(Check the **one** most appropriate box only.)

[X]454 To Recover Money or Property

[ ] 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property

[ ] 458 To obtain approval for sale of both [illegible] interest of the estate and of a co-owner in property

[ ] 424 To object or to revoke a discharge 11 U.S.C. §727

[ ] 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan

[ ] 426 To determine the dischargeability of a debt 11 U.S.C. §523

[X] 434 To obtain an injunction or other equitable relief

[ ] 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan

[ ] 456 To obtain a declaratory judgment relating to any of foregoing causes of action

[ ] 459 To determine a claim or cause of action removed to a bankruptcy court

[ ] 498 Other (specify)

**ORIGIN OF PROCEEDINGS**

(Check one box only.)

| [ ] 1 Original Proceeding | [ ] 2 Removed Proceeding | [X] 4 Reinstated or Reopened | [ ] 5 Transferred from Another Bankruptcy Court |
|---|---|---|---|

[X] CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P.23

DEMAND NEAREST THOUSAND $200,000,000
OTHER RELIEF SOUGHT
[X] JURY DEMAND

**BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES**

NAME OF DEBTOR BANKRUPTCY CASE NO.
Francisco Gonzales 96-94507-7

DISTRICT IN WHICH CASE IS PENDING
Eastern

DIVISIONAL OFFICE
Modesto

NAME OF JUDGE

* * *

ABRAHAM CAMHY.SBN=170224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
(415) 241-9093

JULES BRODY
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
(212) 687-7230

Attorneys for Plaintiff

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| FRANCISCO GONZALEZ, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>AVCO FINANCIAL SERVICES, INC.,<br><br>Defendant. | CHAPTER 7<br>CASE NO. 96-94507-7<br><br>ADVERSARY PROCEEDING<br>CLASS ACTION COMPLAINT |

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

| | | |
|---|---|---|
| In re<br>Francisco Gonzalez<br>Debtor(s). | ) | Case No. 96-94507-A-07 |
| Francisco Gonzalez<br>v. Plaintiff(s),<br>AVCO Financial Services, Inc.<br>Defendant(s). | ) | Adversary Proceeding No. 97-9145-A |

(FILED July 31, 1997)

NOTICE OF AVAILABILITY OF BANKRUPTCY DISPUTE RESOLUTION PROGRAM

NOTICE IS HEREBY GIVEN that, unless otherwise ordered by the judge handling the particular matter, all adversary proceedings, contested matters, and other disputes in a bankruptcy case are eligible for referral to the Bankruptcy Dispute Resolution Program (BDRP) established by General Order 95-1 except matters involving:

1) Employment and compensation of professionals;

2) Compensation of trustees and examiners;

3) Objections to discharge under 11 U.S.C. § 727, except where such objections are joined with disputes over dischargeability of debts under 11 U.S.C. § 523; and

4) Contempt or other types of sanctions.

Parties have the primary responsibility for initiating employment of BDRP. Parties may elect to use the BDRP by submitting an order to the Court in the form of EDC 6-610. In the proposed order, the parties themselves select a Resolution Advocate to mediate the matter in dispute.

Copies of General Order 95-1, BDRP forms, and a list of the names of available Resolution Advocates are available from the Clerk's Office. Questions concerning BDRP procedures should be directed to the staff assistant to the BDRP Administrator, Carlene Walker, at (209) 521-6899.

Dated: July 31, 1997

For the Court
Richard Heltzel, Clerk

I certify that a copy of this notice was returned to the Plaintiff at the time the original summons was issued.

Dated: July 31, 1997

/s/ Jamie Bradshaw
Deputy Clerk

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

| | |
|---|---|
| In re<br>Francisco Gonzalez<br>Debtor(s). | Case No.<br>96-94507-A-07 |
| Francisco Gonzalez<br>v. Plaintiff(s),<br>AVCO Financial Services, Inc.<br>Defendant(s). | Adversary Proceeding No.<br>97-9145-A<br><br>ORDER TO FILE FIRST STATUS REPORT<br><br>(FILED July 31, 1997) |

Pursuant to Fed. R. Civ. P. 16(b) and Fed. R. Bankr. P. 7016,

IT IS ORDERED THAT:

1. The summons and complaint shall be served within 15 days from the date of this order. (Note that the summons expires if not mailed or delivered within 10 days of its issuance, but another summons may be issued. Fed. R. Bankr. P. 7004(f).)

2. Concurrently with the service of process, or as soon thereafter as possible, plaintiff shall serve upon the debtor, debtor's attorney, if any, each party defendant, and all parties subsequently joined, a copy of this order and shall file a certificate reflecting such service.

3. If this action was originally filed in a state court and was thereafter removed and referred to this court, the removing party, within 5 days of the date of this order,

shall serve upon each party, and upon all parties subsequently joined, a copy of this order, and shall file a certificate reflecting such service.

4. Each party shall file a written First Status Report not later than 45 days from the date of this order, or 15 days after receipt of this order, whichever is later.

5. An answer or motion suspending the obligation to answer shall be filed within 30 days after issuance of the summons. Fed. R. Bankr. P. 7012(a). One extension, not exceeding 30 additional days, may be had by written stipulation filed with the court. Any other extension must be by court order. (The time to file First Status Reports may be extended only by court order.)

6. Each party filing a First Status Report shall briefly set out its views on the following matters:

(a) Service of process (*see* Fed. R. Bankr. P. 7004);

(b) Jurisdiction, venue, status as core or noncore proceeding, and whether the party consents to entry of final judgment by this court if the court deems it noncore (*see* 28 U.S.C. §§ 157, 1334, & 1408-12);

(c) Any expected or desired amendment of pleadings (*see* Fed. R. Civ. P. 15; Fed. R. Bankr. P. 7015);

(d) Joinder of parties (*see* Fed. R. Civ. P. 19-20; Fed. R. Bankr. P. 7019-20);

(e) Anticipated motions and scheduling thereof (*see, e.g.*, Fed. R. Civ. P. 12 & 56; Fed. R. Bankr. P. 7012 & 7056);

(f) Anticipated discovery and scheduling thereof (*see, e.g.*, Fed. R. Civ. P. 26-37; Fed. R. Bankr. P. 7026-37);

(g) Proposed dates for completion of discovery and for filing and hearing pretrial motions;

(h) Whether a preliminary pretrial conference and/or a discovery conference (which conferences may be telephonic) or a settlement conference with another judge would be helpful (*see, e.g.*, Fed. R. Civ. P. 16(a) & 26; Fed. R. Bankr. P. 7016 & 7026); and

(i) Any other suggestions that may aid in the just and expeditious disposition of this adversary proceeding.

The First Status Reports shall be the basis for a scheduling order regarding the future course of this adversary proceeding. Fed. R. Civ. P. 16(b); Fed. R. Bankr. P. 7016. A party failing to comply with this order is subject to sanctions pursuant to Fed. R. Civ. P. 16(f), including monetary sanctions, entry of default, dismissal of the complaint, or striking of the answer. In any late-filed First Status Report, in addition to explaining the tardiness, *the late-filing party shall show cause why sanctions should be not be imposed.*

7. Any counsel who enters an appearance in this adversary proceeding shall not, without court order, withdraw or substitute out in a manner that leaves the client in propria persons.

8. Counsel shall notify the court immediately of any settlement or other resolution of this adversary proceeding.

Dated: July 31, 1997

For the Court
Richard Heltzel, Clerk

I certify that a copy of this Order was returned to the Plaintiff at the time the original summons was issued.

Dated: July 31, 1997

/s/ Jamie Bradshaw
Deputy Clerk

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## SUMMARY OF THE ACTION

1. Plaintiff brings this class action pursuant to Bankruptcy Code 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), and the Federal Rule of Bankruptcy Procedure 7023, seeking monetary and declaratory relief on behalf of a Class as defined in 9. Plaintiff and the other members of the Class are debtors who sought a "fresh start" and discharge of their debts pursuant to Chapter 7 of the Bankruptcy Code. Defendant Avco Financial Services, Inc. ("Avco" or the "Company") has employed unlawful practices to collect dischargeable debts by inducing members of the Class to pay discharged, or dischargeable, debt pursuant to unlawfully obtained and unenforceable agreements ("reaffirmation agreements").

2. Avco's unlawful course of conduct includes: (a) willfully violating the automatic stay provisions of Bankruptcy Code § 362; (b) systematically evading judicial oversight and review of its debt collection practices by unlawfully failing to file reaffirmation agreements as

required by Bankruptcy Code § 524; (c) falsely representing that debts associated with unfiled reaffirmation agreements were legally binding; and (d) falsely representing that signed reaffirmation agreements would be filed with the bankruptcy courts, as required by the United States Bankruptcy Code. *See*, Proposed FTC Settlement With Sears Roebuck (Attached hereto as Exhibit A). Avco's violations of the Bankruptcy Code has caused members of the Class to make payments to Avco on debts discharged, or to be discharged, by the Bankruptcy Court. Defendant's wrongful course of conduct has caused debt to be collected from debtors under terms and conditions unknown to this Court, and other bankruptcy courts nationwide, because defendant has successfully evaded judicial review. Avco has, thereby, deprived the Class of the full benefits of a "fresh start" under the Bankruptcy Code.

## JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1334 and 1337.

4. This action arises under Bankruptcy Code §§ 362 and 524 in relation to the above-captioned Chapter 7 case of plaintiff Francisco Gonzalez. Plaintiff Francisco Gonzalez resides at 6316 Clark Street, Keyes California 95328.

5. Plaintiff's action for declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this district, because the acts charged herein, including the defendant's violations of the provisions of the Bankruptcy Code alleged, occurred in this district.

## PARTIES

7. Plaintiff Francisco Gonzalez filed a petition with this Court for Chapter 7 Bankruptcy and signed a reaffirmation agreement on December 20, 1996 (the "Agreement"). The Agreement purported to bind plaintiff to pay pre-petition dischargeable debt to defendant Avco. Avco did not file the Agreement with this Court. Francisco Gonzalez has made payments pursuant to the Agreement and has, thereby, been damaged.

8. (a) Defendant Avco is a consumer finance and insurance company which operates 1,235 finance offices located in all states of the United States (except Arkansas, Kansas, Mississippi, Oklahoma and Vermont), the Commonwealth of Puerto Rico, the Virgin Islands, all Canadian provinces and the Yukon Territory, six Australian states and the Australian Capital Territory, Hong Kong, New Zealand, Spain and the United Kingdom. Defendant Avco is a Delaware corporation which maintains its principal executive offices at 600 Anton Blvd., Costa Mesa, California 92628-5011.

(b) Avco finances small short-term consumer loans, through its subsidiary Avco Financial Services Group. Avco's consumer loan portfolio includes loans which are unsecured and secured by personal property. As of December 31, 1997, Avco's portfolio of outstanding consumer loan receivables totaled over $3.2 billion.

Avco's total portfolio of outstanding loan receivables totals over $7.2 billion. Finance receivables in the United States represented 57% of Avco's total finance receivables outstanding. Outstanding total loan receivables generated in California represented 17% of the Avco's United States portfolio and 9% of Avco's consolidated portfolio in fiscal 1996. California is the only state in which receivables outstanding exceeded 8%.

## PLAINTIFF'S CLASS ACTION ALLEGATIONS

9. Plaintiff brings this action as a class action pursuant to Federal Rule of Bankruptcy Procedure 7023 and Federal Rules of Civil Procedure 23(a) and (b)(3). The class is defined as all individuals:

(a) who filed a petition for relief under the Bankruptcy Code;

(b) who listed Avco as a creditor, against whom Avco has filed a claim or who owe a debt, or an alleged debt, to Avco;

(c) who, subsequent to the filing of the bankruptcy petition, executed an agreement with Avco purporting to reaffirm such debt or alleged debt, or to redeem the applicable property, or which agreement is otherwise subject to the provisions of 11 U.S.C. § 524(c); and

(d) such agreement has not been filed with the Bankruptcy Court in accordance with 11 U.S.C. § 524(c)(3).

10. There are questions of law and fact which are common to all members of the class which questions

predominate over any question affecting only individual class members.

11. The principal common issues are whether Avco, by soliciting as well as inducing bankruptcy debtors to execute purported reaffirmation, redemption or other agreements subject to 11 U.S.C. § 524(c), without complying with the provisions of the Bankruptcy Code governing such agreements, by collecting monies pursuant to such agreements, and by otherwise enforcing or attempting to enforce such agreements, has violated:

(a) § 362 of the Bankruptcy Code;

(b) § 524 of the Bankruptcy Code;

(c) state common law of fraud and deceit; and

(d) state common law of negligent misrepresentation.

12. Two additional common issues are (a) whether plaintiff and class members are entitled to an order declaring that Avco's practices, as described below, render the agreements void and unenforceable, because they violate the express filing requirement of

11 U.S.C. § 524(c)(3) and or violate public policy, in that the agreements arose from willful violations of the Bankruptcy Code; and (b) the appropriate amount of damages and other relief to be granted to plaintiff and class members.

13. The only individual questions concern the identification of class members and the computation of the

relief to be afforded each class member. The above mentioned individual questions can be determined by a ministerial examination of the relevant files.

14. Plaintiff's claims are typical of the claims of the class members. All are based on the same legal and remedial theories.

15. The class is so numerous as to make it impracticable to join all members of the class as plaintiffs.

16. Plaintiff will fairly and adequately protect the interests of all class members in the litigation of this action and in administration of all matters relating to claims stated herein. Plaintiff is similarly situated with, and has suffered similar injuries as the members of the class he seeks to represent. Plaintiff feels that he has been wronged, wishes to obtain redress of the wrong, and wants Avco stopped from perpetrating and continuing to profit from similar wrongs inflicted upon others. To that end, plaintiff has retained counsel experienced in handling class action suits. Neither plaintiff nor their counsel has any interest which might cause them not to vigorously pursue this action.

17. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, in that:

(a) the individual class members are not aware that they have been wronged and are, thus, unable to initiate individual actions;

(b) concentration of the litigation concerning this matter in this Court is desirable;

(c) the claims of the representative plaintiff are typical of the claims of the class;

(d) a failure of justice will result from the absence of a class action; and

(e) the class is of a reasonable size and the difficulties likely to be encountered in the management of a class action are not great.

## SUBSTANTIVE ALLEGATIONS

18. On November 13, 1996, plaintiff Francisco Gonzalez filed a petition for relief under the Bankruptcy Code. His debt to defendant Avco was approximately $410.08.

19. Plaintiff was not represented by counsel in his bankruptcy proceeding.

20. In his bankruptcy petition, plaintiff listed an obligation to pay Avco for credit extended to finance the purchase of items for personal, family or household purposes.

21. On December 20, 1996, Avco executed an agreement with plaintiff (the "Agreement"). The Agreement, a copy of which is attached to this Complaint as Exhibit B, required plaintiff to pay defendant $20 per month against his purported outstanding debt to Avco (at an annual interest rate of 21.79%). The Agreement was presented to plaintiff at a creditors meeting prior to his discharge date. Plaintiff was pressured by Avco into signing the Agreement. Defendant failed to inform plaintiff that he was not required by law to pay the Avco debt.

22. Plaintiff has made payments pursuant to the Agreement over the past six months which have totaled approximately $120.

23. The Agreement is invalid, and not enforceable, because the Agreement failed to comply with Bankruptcy Code § 524(c) which required Avco as a creditor to file the Agreement with this Court.

24. The Agreement fraudulently represented that it was a legally binding document enforceable by creditor Avco by stating that: "**THIS AGREEMENT SHALL BE BINDING ON EACH PARTY AS A VALID CONTRACT ON EACH PARTY WHICH, IN THE EVENT OF DEFAULT, MAY BE ENFORCED BY THE CREDITOR BY JUDGMENT OR OTHER LEGAL MEANS.**" *See*, Exhibit B (*emphasis in original*).

25. Avco neither filed, nor intended to file, the Agreement with the Court.

26. The Agreement, which purported on its face to binding on the plaintiff, falsely implied that it was, or would be, approved by the Court.

27. Avco falsely implied that the plaintiff's execution of the Agreement was necessary in order for the plaintiff to retain the items purchased on credit. The second paragraph of the Agreement states: "[n]ow therefore, *Debtor wishes to retain the collateral*, settle Creditor's claims of nondischargeability under § 523, and or repay the original dischargeable obligation pursuant to Debtor's rights under the Bankruptcy Code." *See*, Exhibit B (emphasis added).

28. If the Agreement had been filed with this Court as required, the Court pursuant to § 524(d) of the Bankruptcy Code would have held a hearing at which plaintiff would have been informed that: (a) the Agreement was not required pursuant to bankruptcy or nonbankruptcy law; and (b) of the legal effect of the agreement and the consequences of default. Moreover, the Agreement would have been permitted only if this Court had determined, pursuant to § 524(d)(2) and (c)(6) that: (a) the Agreement was in the debtor's best interest; and (b) the Agreement did not imposing [sic] an undue hardship on the debtor. THe Court's determination, pursuant to § 524(d)(2) and (c)(6), would have been based upon an assessment as to whether the consideration for the Agreement was based in whole, or in part, on a consumer debt that was not secured by real property of the plaintiff.

Facts Common to the Class

29. Avco has pursued a course similar to that described above with respect to hundreds, if not thousands, of debtors in bankruptcy.

30. On information and belief, Avco has threatened debtors with objections to the dischargeability of their Avco debt in order to coerce these debtors into signing "reaffirmation," "redemption," or other agreements ("reaffirmation agreements") subject to the provisions of 11 U.S.C. § 524(c).

31. On information and belief, in order to avoid the Court's scrutiny of, and likely invalidation of, these reaffirmation agreements Avco withheld the existence of numerous similar reaffirmation agreements from the

knowledge of this court and bankruptcy courts nationwide, simply by not filing these affirmation agreements as required by 11 U.S.C. § 524(c)(3). Defendant's deceptive and unlawful practices has caused payments to be collected from debtors under terms and conditions unknown to the bankruptcy courts supervising their proceedings. Defendant's conduct has deprived members of the Class of the full benefit of a "fresh start" under the Bankruptcy Code.

32. Defendant represented, expressly or by implication, to the Class that their reaffirmation agreements were legally binding on the consumers and that the consumers were legally required to pay their pre-petition debts. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the consumers and the consumers were not legally required to pay their pre-petition debts, because respondent did not file the reaffirmation agreements with the bankruptcy courts.

33. Defendant, in numerous instances, misrepresented, expressly or by implication, to consumers that their reaffirmation agreements would be filed with the bankruptcy courts, as required by the Bankruptcy Code. Defendant in many cases did not intend to file, and in fact did not file, the reaffirmation agreements with the bankruptcy courts.

34. Avco derived substantial profits from its undisclosed "reaffirmation agreement" scheme. These wrongful profits include, but are not limited to, the monies paid by debtors pursuant to such illegal agreements and are enhanced daily as debtors continue to pay under such agreements.

## DAMAGES

35. Plaintiff and class members were damages by defendant's illegal conduct in that they:

(a) paid money to defendant under illegal, unenforceable agreements;

(b) unwittingly deprived themselves of the protections of the Bankruptcy Code; and

(c) paid and continued to pay monthly installments on agreements which were induced by unfair, deceptive and otherwise illegal conduct.

## COUNT I

## WILLFUL VIOLATION OF 11 U.S.C. § 524

36. Plaintiff hereby incorporates by reference herein paragraphs 1 through 35 set forth above.

37. By ignoring and willfully violating specific Bankruptcy Code provisions governing and limiting the permissible post-petition reaffirmation of debt, Avco has violated 11 U.S.C. § 524(a) and (c).

38. Bankruptcy Code § 524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an [illegible] to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." Defendant acted in violation of this injunction by attempting to collect, and collecting, discharged debt.

39. Bankruptcy Code § 524(c)(3) provides that reaffirmation agreements "the consideration for which, in whole or in part," are not enforceable unless "such agreement has been filed with the court." Defendant acted in violation of § 524(c)(3) by failing to file reaffirmation agreements executed with members of the Class. Defendant's failure to file reaffirmation agreements was performed in order to allow the defendant to evade the judicial oversight contemplated by the Bankruptcy Code. As a result thereof, debt has been collected from debtors under terms and conditions unknown to this, and other bankruptcy courts nationwide, because defendant has successfully evaded judicial review. Plaintiff and the members of the Class have, thereby, been deprived of the full benefit of a "fresh start" discharge pursuant to Chapter 7 of the Bankruptcy Code.

## COUNT II

## WILLFUL VIOLATION OF THE AUTOMATIC STAY

40. Plaintiff hereby incorporates by reference herein paragraphs 1 through 35 set forth above.

41. By applying payments made under the above-described reaffirmation agreements to satisfy the debts plaintiff and the class members had incurred before the filing of their bankruptcy petitions, defendant violated the automatic stay provision of the Bankruptcy Code 11 U.S.C. § 362(a). Pursuant to § 362(a) a petition filed under §§ 301, 302 or 303 operates as a stay of "(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title against any claim against the debtor."

42. A relief from the stay pursuant to § 362 may be granted only upon request of the bankruptcy court. Pursuant to § 362(h) an individual injured by a willful violation of a stay provided by § 362 "shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages."

## COUNT III

## AGAINST DEFENDANT FOR FRAUD AND DECEIT

43. Plaintiff hereby incorporates by reference herein paragraphs 1 through 35 set forth above.

44. Defendant Avco employed devices, schemes and artifices to defraud and engaged in acts, practices and a course of conduct whereby: Avco made untrue statements of material facts: omitted to state material facts necessary in order to make the statements made in light of the circumstances under which they were made, not misleading; and engaging in transactions, practices and courses of business which operated as a fraud and deceit upon members of the Class.

45. Defendant represented, expressly or by implication, to the Class that their reaffirmation agreements were legally binding on the Class and that members of the Class were legally required to pay their pre-petition debts. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding on the members of the Class and the members of the class were not legally required to pay their pre-petition debts, because Avco had not filed the reaffirmation agreements with the bankruptcy courts.

46. Defendant, in numerous instances, misrepresented, expressly or by implication, to members of the Class that their reaffirmation agreements would be filed and or approved by the bankruptcy courts, as required by the Bankruptcy Code. Defendant in many cases did not intend to file, and in fact did not file, reaffirmation agreements with the bankruptcy courts.

47. As a proximate result of defendant's conduct as aforesaid, plaintiff and the Class suffered damages including, but not limited to, monetary damages, loss of future income, and other general and specific damages.

48. The aforementioned acts of the defendant were done maliciously, oppressively and with the intent to defraud, and plaintiffs as well as the other members of the Class. Plaintiffs and the Class are, therefore, entitled to punitive and exemplary damages in an amount to be ascertained according to proof.

## COUNT IV

## AGAINST DEFENDANT FOR NEGLIGENT MISREPRESENTATION

49. Plaintiff hereby incorporates by reference paragraphs 1 through 35 above as though fully set forth herein.

50. In making the representations and omissions and pursuing the course of conduct alleged above, the defendant acted without any reasonable grounds for believing the representations were true or that its actions were not misleading, and intended by said representations and actions to induce plaintiff's reliance.

51. Defendant represented, expressly or by implication, to the Class that their reaffirmation agreements were legally binding on the Class and that the members of the Class were legally required to pay their pre-petition debts. In truth and in fact, in many cases, the reaffirmation agreements were not legally binding. Plaintiff and the Class were not legally required to pay their pre-petition debts, because Avco did not file their reaffirmation agreements with the bankruptcy courts.

52. Defendant, in numerous instances, misrepresented, expressly or by implication, to the Class that their reaffirmation agreements would be filed and/or approved by the bankruptcy courts, as required by the Bankruptcy Code. Defendant in many cases did not intend to file, and in fact did not file, reaffirmation agreements executed by members of the Class with the bankruptcy courts.

53. As a proximate result of the defendants' conduct as aforesaid, plaintiffs were damaged including, but not limited to, injury to their property, lost profits, loss of future income, and other general and specific damages.

54. The aforementioned acts of the defendant were done maliciously, oppressively and with intent to defraud, and plaintiff and the Class are entitled to punitive and exemplary damages in an amount to be ascertained according to proof.

**WHEREFORE**, plaintiff prays for relief and judgment, as follows:

1. Take jurisdiction over this class action.

2. Certify the plaintiff class defined in paragraphs 8-16 above;

3. Enter judgment and grand relief declaring that defendant's conduct, as detailed above, violates:

(a) Bankruptcy Code § 362;

(b) Bankruptcy Code § 524;

(c) state common law of fraud and deceit; and

(d) state common law of negligent misrepresentation.

4. Order defendant's, their successors, agents, employees, and all other persons in active concert and participation with defendant to immediately refund to debtors all payments made under such improperly obtained and unenforceable agreements.

5. Assess exemplary or punitive damages against defendant in an amount which the Court determines to be appropriate for defendant's willful violations of the Bankruptcy Code.

6. Award the plaintiff an incentive payment of two thousand ($2,000) dollars for serving as the class representatives in this action;

7. Award the plaintiff his reasonable attorneys' fees and costs; and

8. Grant such other relief as the Court deems appropriate and just.

DATED: July 7, 1997

Respectfully submitted,
Francisco Gonzalez
By his attorneys

BY: /s/ Abraham Camhy
Abraham Camhy, SBN #170244
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
phone: (415) 241-9093
fax: (415) 241-9094

Jules Brody
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
phone: (212) 687-7230
fax: (212) 490-2022

Attorneys for Plaintiff

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**[EXHIBT A]**

FOR RELEASE: June 4, 1997

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FTC SETTLEMENT WITH SEARS, ROEBUCK TO SAFEGUARD $100 MILLION REDRESS TO CONSUMERS

Resolves Charges over Collection of "Reaffirmed Debts" from Consumers in Bankruptcy

A settlement agreement that the Federal Trade Commission has negotiated with Sears, Roebuck and Co. would give the agency a tool to ensure that Sears makes full refunds totaling up to $100 million or more to consumers who, having had their Sears account debts discharged in bankruptcy proceedings, continued to make payments or face illegal collection efforts. According to the FTC and others, Sears induced consumers who filed for bankruptcy protection to agree to reaffirm their Sears credit account debts, in order to keep their Sears credit card or merchandise. In numerous instances, the FTC alleged, Sears falsely represented that these "reaffirmation agreements" would be filed with the bankruptcy courts, as required by law, and that the consumers would be legally obligated to pay. In fact, the FTC charged, in many cases Sears did not file the agreements or the bankruptcy courts did not approve them. As a result, the agreements were not binding. Sears' practices may have affected more than 200,000 Sears customers. The FTC action was coordinated with settlement of a class action lawsuit against Sears, to be submitted to the U.S. Bankruptcy Court in Boston tomorrow.

"Since at least 1985, Sears has undermined some very important consumer protections embedded in the American bankruptcy process," said Jodie Bernstein, Director of the FTC's Bureau of Consumer Protection. "This process is designed to give consumers in dire financial circumstances a fresh start by protecting them from creditors, and in some instances, from themselves. Yet, ignoring steps prescribed by law, Sears induced consumers to pay debts they did not legally owe. The settlement announced today is designed to prohibit Sears from engaging in such

practices in the future, and to allow the FTC to follow up in federal court should Sears fail to return all of the financial gain it realized through these illegal collection efforts.

"We are very concerned about any effort to collect debts under a reaffirmation agreement that is not properly filed or approved," Bernstein continued. "To the extent that any retailer contacts consumers in bankruptcy, and offers them the chance to keep credit or merchandise purchased on secured credit by signing a reaffirmation agreement, that agreement must be filed and, in some cases, approved by the court. Otherwise, consumers are NOT obligated to pay."

Under the settlement the FTC has reached with Sears, one of the nation's largest retailers would be prohibited from misrepresenting that any reaffirmation agreement it obtains will be filed with the bankruptcy court, that any reaffirmation agreement is binding, or any other material fact while attempting to collect debts subject to a pending bankruptcy proceeding. In addition, the settlement would bar Sears from collecting debts that have been discharged in bankruptcy court proceedings.

The proposed consent agreement also preserves the Commission's right to file an action in federal district court to seek full redress for consumers if Sears' refunds to debtors pursuant to the class action lawsuit settlement total less than $100 million. (This amount could be adjusted up or down by not more than 25 percent, based on the results of Sears' ongoing process of identifying

consumers eligible for redress.) The class action settlement requires Sears to completely redress debtors, with interest, for payments wrongfully obtained.

The Commission vote to accept the proposed consent agreement for a public comment period was 5-0. A summary of the agreement will be published in the *Federal Register* shortly. The agreement will be subject to public comment for 60 days, after which the Commission will decide whether to make it final. Comments should be addressed to the FTC, Office of the Secretary, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

**NOTE:** A consent agreement is for settlement purposes only and does not constitute an admission of a law violation. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $11,000.

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Copies of the *complaint, proposed consent agreement, and an announcement of the agreement to assist the public* in commenting are available from the FTC's web site at *http://www.ftc.gov* and also from the FTC's Public Reference Branch, Room 130, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580; 202-326-2232; TTY for the hearing impaired 202-326-2502. Consent agreements subject to public comment also are available by calling 202-326-3627. To find out the latest news as it is announced, call the FTC NewsPhone recording at 202-326-2710.

MEDIA CONTACT:
Bonnie Jansen
Office of Public Affairs
202-326-2161 or 202-326-2180

STAFF CONTACT:
David Medine
Bureau of Consumer Protection
202-326-3224

or

Paul Block
Boston Regional Office
101 Merrimac Street, Suite 810
Boston, Massachusetts 02114-4749
617-424-5960

(FTC File No. 97-3187)

(Sears)

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**[EXHIBIT B]**

**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

In re (Debtors) Francisco Gonzalez
Case Number: 96-94507
Account Number: 745808768
Address: 5316 Clark St POP Box 219 [illegible] Ca 93325
Home Phone: 668-3239
Employer: _____

## AGREEMENT TO REAFFIRM

Whereas on the date of filing bankruptcy, Debtor was indebted to Avco Financial Svs. ("Creditor") as evidenced by a promissory note and security agreement (if any) dated 8/23/96, and upon which remains an unpaid balance of $410.08 secured by ___ personal property, ___ motor vehicle, ___ real estate, or ___ unsecured.

Now therefore, Debtor wishes to retain the collateral, settle Creditor's claims of nondischargeability under §523, and/or repay the original dischargeable obligation pursuant to Debtor's rights under the Bankruptcy Code. Debtor reaffirms and agrees to pay the Creditor the sum of $410.08 at 21.79% interest per annum, by making monthly payments of $20.00, at 21.79% interest per annum, payable on the 20 day of each and every month beginning 2-20-97 and all subsequent installments on the same day of each month until paid in full. If the full balance of the debt is reaffirmed, the Debtor agrees to be bound by all the other terms of the original loan documents.

THE DEBTOR UNDERSTANDS THE THIS AGREEMENT IS NOT REQUIRED BY BANKRUPTCY LAW, NON-BANKRUPTCY LAW OR BY ANY AGREEMENT NOT IN ACCORDANCE WITH THE BANKRUPTCY CODE; AND THAT THIS AGREEMENT SHALL BE BINDING ON EACH PARTY AS A VALID CONTRACT WHICH, IN THE EVENT OF DEFAULT, MAY BE ENFORCED BY THE CREDITOR BY JUDGMENT OR OTHER APPROPRIATE LEGAL MEANS.

THIS REAFFIRMATION AGREEMENT MAY BE RESCINDED AT ANY TIME PRIOR TO DISCHARGE OF WITHIN 60 DAYS AFTER IT HAS BEEN FILED WITH THE COURT, WHICHEVER OCCURS LATER, BY GIVING WRITTEN NOTICE OF THE RESCISSION TO THE CREDITOR.

In the event Debtor does rescind, Debtor is aware that Creditor will keep all payments made and may be entitled to other remedies including taking possession of any collateral: Debtor certifies that this agreement is purely voluntary, is not an undue hardship and is entered into before the discharge date.

Dated this 20 day of Dec 1996

Creditor _____

Debtor
/s/ Francisco Gonzalez

Co-Debtor _____

Debtor's Attorney Declaration: The above Reaffirmation Agreement represents a fully informed and voluntary agreement by the Debtor(s) and does not impose an undue hardship upon the Debtor(s) or dependents of the debtor(s) and I have fully advised the Debtor(s) of the legal effect and consequences of this agreement and of any default under this agreement.

Date _____ Attorney _____

Stephen E. Carroll, #116333
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH, LLP
P.O. Box 28912
5 River Park Place East
Fresno, CA 93729-8912
Telephone: (209) 433-1300
Facsimile: (209) 433-2300

Attorneys for Defendant AVCO FINANCIAL SERVICES OF SOUTHERN CALIFORNIA, INC., erroneously sued herein as AVCO FINANCIAL SERVICES, INC.

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

| | |
|---|---|
| FRANCISCO GONZALEZ, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>AVCO FINANCIAL SERVICES, INC.,<br><br>Defendant. | CHAPTER 7<br>CASE NO. 96-94507-7<br><br>ANSWER TO COMPLAINT AND DEMAND FOR JURY TRIAL |

Defendant, AVCO FINANCIAL SERVICES OF SOUTHERN CALIFORNIA, INC., a California corporation, erroneously sued herein as AVCO FINANCIAL SERVICES, INC., ("Answering Defendant"), hereby makes

demand for trial by jury and admits, denies and alleges as follows:

## ANSWER TO "SUMMARY OF THE ACTION" ALLEGATIONS

1. Answering Paragraph 1 of the Complaint, this Answering Defendant alleges that Plaintiff has purported to bring this action as a class action pursuant to Bankruptcy Code 11 U.S.C. Section 101 et seq. and Federal Rule of Bankruptcy Procedure 7023 and that the Complaint on file herein seeks monetary and declaratory relief on behalf of a purported class. This Answering Defendant further admits that the Plaintiff had sought to discharge his debts pursuant to Chapter 7 of the Bankruptcy Code. This Answering Defendant denies each and every remaining allegation contained in Paragraph 1 of the Complaint.

2. Answering Paragraph 2 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

## ANSWER TO "JURISDICTION AND VENUE" ALLEGATIONS

3. Answering Paragraph 3 of the Complaint, this Answering Defendant denies that this Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. Section 1337.

4. Answering Paragraph 4 of the Complaint, this Answering Defendant alleges that it lacks sufficient information with which to form a belief as to the truth of the

allegations thereof, and basing its denial thereon, denies each and every allegation contained therein.

5. Answering Paragraph 5 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

6. Answering Paragraph 6 of the Complaint, this Answering Defendant admits that the venue of this action is proper within this district, based upon the allegations of the Complaint, and denies each and every remaining allegation contained therein.

## ANSWER TO "PARTIES" ALLEGATIONS

7. Answering Paragraph 7 of the Complaint, this Answering Defendant admits that Plaintiff GONZALEZ filed a petition with the Court for Chapter 7 bankruptcy and signed the agreement attached as Exhibit "B" to the Complaint on file herein on or about December 20, 1996, and that the provisions of said Agreement are as they appear in Exhibit "B". AVCO further admits that Plaintiff GONZALEZ has made payments. This answering Defendant denies each and every remaining allegation contained in Paragraph 7 of the Complaint.

8. Answering Paragraph 8 of the Complaint, this Answering Defendant denies each and every allegation contained therein by virtue of the fact that the entity referred to therein and purportedly described therein is not properly a defendant in this action, in that AVCO FINANCIAL SERVICES, INC., is not a party to the loan which is in part the subject of this action, and was not a

party to the agreement attached as Exhibit "B" to the Complaint.

## ANSWER TO "PLAINTIFF'S CLASS ACTION" ALLEGATIONS

9. Answering Paragraphs 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

## ANSWER TO "SUBSTANTIVE" ALLEGATIONS

10. Answering Paragraph 18 of the Complaint, this Answering Defendant admits the allegations contained therein.

11. Answering Paragraph 19 of the Complaint, this Answering Defendant lacks sufficient information with which to form a belief as to the truth of the allegations contained therein, and basing its denial thereon, denies each and every allegation contained in said paragraph.

12. Answering Paragraph 20 of the Complaint, this Answering Defendant admits the allegations contained therein.

13. Answering Paragraph 21 of the Complaint, this Answering Defendant alleges that the provisions of the agreement attached as Exhibit "B" to the Complaint herein are as they appear in said document. This Answering Defendant denies each and every remaining allegation contained in Paragraph 21 of the Complaint.

14. Answering Paragraph 22 of the Complaint, this Answering Defendant admits the allegations contained therein.

15. Answering Paragraph 23 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

16. Answering Paragraph 24 of the Complaint, this Answering Defendant alleges that the provisions of the agreement attached as Exhibit "B" to the Complaint herein are as they appear in said document. This Answering Defendant denies each and every remaining allegation contained in Paragraph 24 of the Complaint.

17. Answering Paragraph 25 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

18. Answering Paragraph 26 of the Complaint, this Answering Defendant alleges that the provisions of the agreement attached as Exhibit "B" to the Complaint herein are as they appear in said document. This Answering Defendant denies each and every remaining allegation contained in Paragraph 26 of the Complaint.

19. Answering Paragraph 27 of the Complaint, this Answering Defendant alleges that the provisions of the agreement attached as Exhibit "B" to the Complaint herein are as they appear in said document. This Answering Defendant denies each and every remaining allegation contained in Paragraph 27 of the Complaint.

20. Answering Paragraph 28 of the Complaint, this Answering Defendant alleges that Section 524 of the Bankruptcy Code provides as set forth in Exhibit "A" hereto, which is incorporated herein by this reference as though fully set forth. This Answering Defendant lacks sufficient information with which to form a belief as to

the truth of the remaining allegations of said paragraph, and basing its denial thereon, denies each and every remaining allegation of paragraph 28 of the Complaint.

## ANSWER TO "FACTS COMMON TO THE CLASS" ALLEGATIONS

21. Answering Paragraphs 29, 30, 31, 32, 33 and 34 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

## ANSWER TO "DAMAGES" ALLEGATIONS

22. Answering Paragraph 35 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

## ANSWER TO COUNT 1, PURPORTED VIOLATIONS OF 11 U.S.C. § 524

23. Answering Paragraph 36 of the Complaint, this Answering Defendant refers to and realleges each and every allegation contained in Paragraphs 1 through 22 of this Answer and incorporates the same herein by this reference as though fully set forth.

24. Answering Paragraph 37 of the Complaint, this Answering Defendant denies each and every allegation contained therein.

25. Answering Paragraph 38 of the Complaint, this Answering Defendant alleges that 11 U.S.C. Section 524 provides as alleged hereinabove, and denies each and every remaining allegation contained in Paragraph 38 of the Complaint.

26. Answering Paragraph 39 of the Complaint, this Answering Defendant alleges that 11 U.S.C. Section 524 provides as alleged hereinabove, and denies each and every remaining allegation contained in Paragraph 39 of the Complaint.

**ANSWER TO COUNT 2, PURPORTED WILLFUL VIOLATIONS OF THE AUTOMATIC STAY**

27. Answering Paragraph 40 of the Complaint, this Answering Defendant refers to and realleges each and every allegation contained in Paragraphs 1 through 26 of this Answer and incorporates the same herein by this reference as though fully set forth.

28. Answering Paragraph 41 of the Complaint, this Answering Defendant alleges that 11 U.S.C. Section 362 provides as set forth in Exhibit "B" hereto, which is incorporated herein by this reference as though fully set forth. This Answering Defendant denies each and every remaining allegation contained in paragraph 41 of the Complaint.

29. Answering Paragraph 42 of the Complaint, this Answering Defendant alleges that 11 U.S.C. Section 362 provides as has been alleged hereinabove, and denies each and every remaining allegation contained in said paragraph.

**ANSWER TO COUNT III, FOR PURPORTED FRAUD AND DECEIT**

30. Answering Paragraph 43 of the Complaint, this Answering Defendant refers to and realleges each and every allegation contained in Paragraphs 1 through 29 of

this Answer and incorporates the same herein by this reference as though fully set forth.

31. Answering Paragraphs 44, 45, 46, 47 and 48 of the Complaint, this Answering Defendant denies each and every allegation contained in said paragraphs of the Complaint.

## ANSWER TO COUNT IV, FOR PURPORTED NEGLIGENT MISREPRESENTATION

32. Answering Paragraph 49 of the Complaint, this Answering Defendant refers to and realleges each and every allegation contained in Paragraphs 1 through 31 of this Answer and incorporates the same herein by this reference as though fully set forth.

33. Answering Paragraphs 50, 51, 52, 53 and 54 of the Complaint, this Answering Defendant denies each and every allegation contained in said paragraphs of the Complaint.

## FIRST AFFIRMATIVE DEFENSE

34. Plaintiff's Complaint, and each and every purported cause of action contained therein, fails to allege facts sufficient to constitute a cause of action or claim against this Answering Defendant.

## SECOND AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

35. This Answering Defendant is informed and believes, and thereupon alleges, that Plaintiff failed to

reasonably act to mitigate his damages, and to such an extent, should be barred from any recovery herein.

**THIRD AFFIRMATIVE DEFENSE**

(Statute of Limitations)

36. This Answering Defendant alleges that Plaintiff's claims were not commenced within, and are therefore barred by, the applicable statutes of limitations.

**FOURTH AFFIRMATIVE DEFENSE**

(Statute of Frauds)

37. To the extent that Plaintiff's claims are based upon any alleged rights or duties rising out of any alleged oral promises, commitments or agreements, the provisions of Civil Code Section 1624, subdivision 1, bar any recovery based thereon herein.

**FIFTH AFFIRMATIVE DEFENSE**

(Comparative Negligence)

38. This Answering Defendant alleges that injuries allegedly suffered by Plaintiff were proximately caused by Plaintiff's own negligence.

**SIXTH AFFIRMATIVE DEFENSE**

(Laches)

39. This Answering Defendant alleges that Plaintiff has unreasonably delayed in the filing of this action, which delay had been prejudicial to this Answering Defendant and bars Plaintiff from any recovery herein.

## SEVENTH AFFIRMATIVE DEFENSE

(Estoppel)

40. This Answering Defendant alleges that by reason of the knowledge, statements and conduct of Plaintiff and/or his agents, which have at all times been detrimentally relied upon by this Answering Defendant, Plaintiff is barred from any recovery by virtue of the doctrine of estoppel.

## EIGHTH AFFIRMATIVE DEFENSE

(Unclean Hands)

41. This Answering Defendant alleges that Plaintiff has acted with unclean hands, which conduct has prejudiced this Answering Defendant, and bars any recovery herein.

## NINTH AFFIRMATIVE DEFENSE

(Waiver)

42. This Answering Defendant alleges that Plaintiff has waived any alleged fraudulent misrepresentations or negligent misrepresentations by this Answering Defendant and consequently is barred from any recovery herein.

## TENTH AFFIRMATIVE DEFENSE

(Failure to Join a Party Necessary for Just Adjudication)

43. This Answering Defendant alleges that Plaintiff has failed to join a party necessary for the just adjudication of this action, National Bankruptcy Services, ("NBS"). In the absence of the joinder of NBS, complete relief cannot be accorded among present parties to this action. This Answering Defendant is informed and believes, and thereupon alleges, that NBS was the entity which dealt with Plaintiff in connection with Exhibit "B" to the Complaint and which failed, to the extent it was required to do so, to file Exhibit "B" to the Complaint as part of Plaintiff's bankruptcy proceedings. This Answering Defendant is informed and believes, and thereupon alleges, that NBS is subject to service of process and will not deprive this Court of jurisdiction over the subject matter of this action if joined as a party.

## ELEVENTH AFFIRMATIVE DEFENSE

(Good Faith)

44. This Answering Defendant alleges that it acted in good faith and observed all reasonable commercial and statutory standards in connection with any dealings which it may have had with Plaintiff, and that Plaintiff is consequently barred from any recovery herein.

**TWELFTH AFFIRMATIVE DEFENSE**

(Intervening/Superseding Cause)

45. This Answering Defendant alleges that Plaintiff's injuries and damages, if any, were caused by the conduct of persons other than this Answering Defendant. The conduct of said third person or persons is the intervening and/or superseding cause of Plaintiff's injuries and damages, if any

WHEREFORE, this Answering Defendant prays judgment against Plaintiff as follows:

(1) That Plaintiff take nothing by reason of his Complaint;

(2) For reasonable attorney's fees in an amount according to proof;

(3) For costs of suit incurred herein; and

(4) For such other and further relief as the Court deems just and proper,

Dated: September ___, 1997

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: /s/ _____

Stephen E. Carroll
Attorneys for Defendant
AVCO FINANCIAL SERVICES OF SOUTHERN CALIFORNIA, INC., a California corporation

Stephen R. Cornwell, #40737
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP
P.O. Box 28912
5 River Park Place East
Fresno, CA 93729-8912
Telephone: (209) 433-1300
Facsimile: (209) 433-2300

Stephen Brandon
AVCO FINANCIAL SERVICES, INC.
600 Anton Building
P. O. Box 5011
Costa Mesa, CA 92628-5011

Attorneys for Defendant
AVCO FINANCIAL SERVICES OF SOUTHERN
CALIFORNIA, INC., erroneously sued herein as
AVCO FINANCIAL SERVICES, INC.

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

| | |
|---|---|
| FRANCISCO GONZALEZ,<br>Debtor, | CASE NO. 96-94507-7<br>CHAPTER 7<br>ADV. PRO. NO.<br>97-9145-A<br><br>DEFENDANT'S<br>AMENDED FIRST<br>STATUS REPORT |
| FRANCISCO GONZALES,<br>on behalf of himself and | |

all others similarly situated,

Plaintiff,

vs.

AVCO FINANCIAL SERVICES, INC.,

Defendant.

## I. Introduction

This is an action seeking damages claiming improper handling of a reaffirmation agreement relating to Plaintiff's bankruptcy. The Defendant, Avco Financial Services of Southern California, Inc., has filed its appearance in this action denying the allegations of the complaint. Plaintiff erroneously served a non-existent party, however, the Defendant answered since it was the original lender. Avco Financial Services, Inc. was the creditor at the time of the Plaintiff's bankruptcy.

Plaintiff has indicated a wish to dismiss this action so that it may be joined with other actions pending in Rhode Island. The Defendant objects to this tactic which will move this case across the country despite the fact that all of the witnesses are located here in California. The fact that Textron may or may not be joined in that action should have no bearing upon this court's handling of this action against Avco Financial Services of Southern California, a California corporation, for debts arising in California involving California residents and in which all witnesses are California residents.

**II. Service of Process**

Plaintiff served Avco Financial Services, Inc., a Delaware corporation. Avco Financial Services of Southern California, Inc. was the lender and has entered an appearance.

Jurisdiction and Venue of this action appear appropriate.

**III. Expected Amendment of Pleadings**

The proceedings are new and there has been very little investigation and no discovery. Amendments may be necessary to the answer. It is also anticipated that a cross-claim may be filed joining a new party in the next week.

**IV. Joinder of Parties**

The Defendant will probably file a cross action joining a third party defendant which is a California resident. This is presently being considered. Plaintiff may seek to join other entities involved in the leading and collection of the Plaintiff's debt.

**V. Anticipated Motions**

None are currently contemplated.

## VI. Anticipated Discovery

The Defendant anticipates thorough discovery. On the assumption that the Plaintiff will undertake some discovery, it is estimated that such discovery can be completed in 4 months. There is no discovery currently set.

## VII. Proposed Dates for Completion of Discovery and the Filing and Hearing of Pretrial Motions

Given the status of matters at the present time and the uncertainty of Plaintiff's intentions, it is requested that the court set another status conference in the near future so that this matter can be considered in the light of recent developments.

## VIII. Preliminary Pretrial Conference/Discovery Conference/Settlement Conference

A discovery conference in six to eight weeks is suggested at which time the parties will be better able to inform the court of needed time to prepare. It would not appear that a settlement conference at this juncture would be advisable.

## IX. Other Suggestions

Plaintiff seeks to dismiss this action only to pursue it in Rhode Island. The Defendant objects. All of the witnesses in this matter are in California, the Defendant resides in California, the Plaintiff resides in California, the original court action arose in California. It is requested that the Plaintiff acknowledge abandonment of

his announced intention to attempt to dismiss this action here or that the court issue its order denying any attempt to do so.

Dated: September 25, 1997

McCORMICK, BARSTOW,
SHEPPARD, WAYTE &
CARRUTH LLP

By: _____
Stephen R. Cornwell
Riley C. Walter
Stephen E. Carroll
Attorneys for AVCO FINANCIAL
SERVICES OF SOUTHERN
CALIFORNIA, INC.

ABRAHAM CAMHY, 3BN #170224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
(415) 241-9093

JULES BRODY
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
(212) 687-7230

Attorneys for Plaintiff

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF CALIFORNIA**
**MODESTO DIVISION**

| | |
|---|---|
| FRANCISCO GONZALEZ,<br>Debtor, | Case No. 96-94507-A-07 |
| FRANCISCO GONZALEZ, on behalf of himself and all others similarly situated,<br>Plaintiff,<br>v.<br>AVCO FINANCIAL SERVICES, INC.,<br>Defendant. | Adversary Preceding No. 97-9145-A<br>MC No. AC-2<br>*Class Action*<br>NOTICE OF MOTION FOR VOLUNTARY DISMISSAL<br>Date: November 3, 1997<br>Time: 2 p.m.<br>Place: E.D.C.A. (Modesto)<br>Judge: Honorable Michael S. McManus |

**TO ALL PARTIES, AVCO FINANCIAL SERVICES OF SOUTHERN CALIFORNIA, INC. AND THEIR RESPECTIVE ATTORNEYS OF RECORD:**

**NOTICE IS HEREBY GIVEN** that on November 3, 1997 at 2 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, in the courtroom of the Honorable Michael S. McManus, located at 1130 12th Street, Modesto, California, plaintiff Francisco Gonzales will move the Court for an order to voluntarily dismiss this action pursuant to Fed. R. Bankr. P. 7041 and 7023, which incorporates Fed. R. Civ. P. 41(a) and 23(e).

This motion is based on this Notice of Motion, Plaintiff's Motion For Voluntary Dismissal, the accompanying memorandum, the Declaration of Abraham Camhy In Support of Plaintiff's Motion For Voluntary Dismissal, and the pleadings and papers on file, and upon such other evidence, oral or written, as may be presented to the Court.

Dated: October 6, 1997

Respectfully submitted,
Francisco Gonzalez
By his attorneys

By: /s/ Abraham Camhy

Abraham Camhy, SBN #170224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
phone: (415) 241-9093

Jules Brody
STULL, STULL & BRODY
6 East 45th Street
New York, New York
10017
phone: (212) 687-7230

Attorneys for Plaintiff

ABRAHAM CAMHY, SBN #170224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
(415) 241-9093

JULES BRODY
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
(212) 687-7230

Attorneys for Plaintiff

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF CALIFORNIA**
**MODESTO DIVISION**

| | |
|---|---|
| FRANCISCO GONZALEZ,<br>Debtor, | Case No. 96-94507-A-07 |
| FRANCISCO GONZALEZ, on behalf of himself and all others similarly situated,<br>Plaintiff,<br>v.<br>AVCO FINANCIAL SERVICES, INC.,<br>Defendant. | Adversary Preceding No. 97-9145-A<br>MC No. AC-2<br>*Class Action*<br>MOTION FOR VOLUNTARY DISMISSAL<br>Date: November 3, 1997<br>Time: 2 p.m.<br>Place: E.D.C.A. (Modesto)<br>Judge: Honorable Michael S. McManus |

Plaintiff Francisco Gonzalez hereby moves for voluntary dismissal of this action pursuant to Fed. R. Bankr. P. 7041 and 7023, which incorporates Fed. R. Civ. P. 41(a) and 23(e) for the following reasons:

1. This adversarial proceeding was filed on July 31, 1997.

2. Service of the complaint, and the Order To File First Status Report was made on September 4, 1997, pursuant to a summons issued on September 2, 1997.

3. After filing the above captioned action, plaintiff became aware of the filing of two related actions in Rhode Island. A proposed class action entitled *Bessette v. Avco Financial Services, et al.*, Civil Docket Number 97-CV-487 (filed on August 25, 1997) (the "*Bessette* Action"). is pending in the U.S. District Court for the District of Rhode Island (Providence). The *Bessette* Action alleges the same wrongful course of conduct as that alleged by plaintiff and seeks to represent a nationwide class of persons. *See* Camhy Decl. Exh. A.[1]

4. An adversary proceeding brought on behalf of an individual debtor, entitled *Nancy Rosi v. Avco Financial Services*, BK No. 92-12708/AP 971108 (filed on July 8, 1997), is also pending in the U.S. Bankruptcy Court for the District of Rhode Island.

5. On September 16, 1997, Avco Financial Services of Southern California filed an answer to plaintiff's complaint as well as a First Status Report.

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[1] References to Camhy Decl. Exh. A refer to Exhibits attached to the Declaration of Abraham Camhy In Support Of Plaintiff's Motion For Voluntary Dismissal.

6. Avco Financial Services, Inc. the named defendant, did not answer plaintiff's complaint.

7. Plaintiff moved to voluntarily dismiss this action on September 22, 1997.

8. On September 25, 1997, Avco Financial services of Southern California objected to plaintiff's motion for voluntary dismissal of this action and filed an Amended First Status Report.

9. On September 25, 1997, the Court denied plaintiff's motion for voluntary dismissal without prejudice. The Court's order instructed plaintiff to set the matter for hearing on notice to Avco Financial Services of Southern California in order to pursue the voluntary dismissal of this action.

10. The dismissal of this action without prejudice is once again requested by plaintiff so that plaintiff's continued litigation of his allegations in this Court will not conflict with, impede, or drain resources from a nearly identical proposed class action which is currently being litigated by highly experienced counsel in the Federal District Court for the District of Rhode Island.

11. Avco Financial Services of Southern California, Inc. ("Avco Financial Services of Southern California") will suffer no legal prejudice as a result of the voluntary dismissal of this action. The only effort and expense that has been incurred by Avco Financial Services of Southern California has resulted from: (a) its insistence on appearing in this action even though Avco Financial Services of Southern California was not named as a party; and (b) its efforts to oppose plaintiff's attempts to have this action

voluntarily dismissed. Therefore, plaintiff's motion for voluntary dismissal without prejudice should be granted.

12. This motion is based on this Motion For Voluntary Dismissal, the accompanying memorandum (and exhibits thereto), the Declaration of Abraham Camhy In Support of Plaintiff's Motion For Voluntary Dismissal and the pleadings and papers on file, and upon such other evidence, oral or written, as may be presented to the Court.

WHEREFORE, Plaintiff prays that his voluntary dismissal without prejudice will be granted and for such other relief as is just and proper.

Dated: October 6, 1997

Respectfully submitted,
Francisco Gonzalez
By his attorneys

By: /s/ Abraham Camhy

Abraham Camhy, SBN #170224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
phone: (415) 241-9093

Jules Brody
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
phone: (212) 687-7230

Attorneys for Plaintiff

ABRAHAM CAMHY, SBN #170224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
(415) 241-9093

JULES BRODY
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
(212) 687-7230

Attorneys for Plaintiff

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF CALIFORNIA**
**MODESTO DIVISION**

| | |
|---|---|
| FRANCISCO GONZALEZ,<br>Debtor, | Case No. 96-94507-A-07 |
| FRANCISCO GONZALEZ, on behalf of himself and all others similarly situated,<br>Plaintiff,<br>v.<br>AVCO FINANCIAL SERVICES, INC.,<br>Defendant. | Adversary Preceding No. 97-9145-A<br>MC No. AC-2<br>*Class Action* |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL**

Scheduled for hearing:
Date: November 3, 1997
Time: 2 p.m.
Place: E.D.C.A. (Modesto)
Judge: Honorable Michael S. McManus

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## PRELIMINARY STATEMENT

Plaintiff respectfully requests the dismissal of this duplicative proposed class action without prejudice pursuant to Fed. R. Bankr. P. 7041 and 7023, which incorporates Fed. R. Civ. P. 41(a) and Fed. R. Civ. P. 23(e). Plaintiff brings this motion pursuant to Fed. R. Civ. P. 41(a)(1), or alternatively, Fed. R. Civ. P. 41(a)(2). The dismissal of this action without prejudice is requested by plaintiff so that plaintiff's continued litigation of his allegations in this Court will not conflict with, impede, or drain resources from a nearly identical proposed class action which is currently being litigated by highly experienced counsel in the Federal District Court for the District of Rhode Island.

Avco Financial Services of Southern California, Inc. ("Avco Financial Services of Southern California") will suffer no legal prejudice as a result of the voluntary dismissal of this action. The only effort and expense that has been incurred by Avco Financial Services of Southern California has resulted from: (a) its insistence on appearing in this action even though Avco Financial Services of Southern California was not named as a party; and (b) its efforts to oppose plaintiff's attempts to have this action volunatrily [sic] dismissed. Therefore, plaintiff's motion for voluntary dismissal without prejudice should be granted.

## STATEMENT OF THE FACTS

This adversarial proceeding was filed on July 31, 1997. Service of the complaint, and the Order To File First Status Report was made on September 4, 1997, pursuant to a summons issued on September 2, 1997. After filing

the above captioned action, plaintiff became aware of the filing of two related actions in Rhode Island. A proposed class action entitled *Bessette v. Avco Financial Services, et al.*, Civil Docket Number 97-CF-487 (filed on August 25, 1997) (the "*Bessette* Action"), is pending in the U.S. District Court for the District of Rhode Island (Providence). The *Bessette* Action alleges the same wrongful course of conduct as that alleged by plaintiff and seeks to represent a nationwide [illegible] of persons. *See* Camhy Decl. Exh. [illegible] An adversary proceeding brought on behalf of an individual debtor, entitled *Nancy Rosi v. Avco Financial Services*, BK No. 92-12708/AP 971108 (filed on July 8, 1997), is also pending in the U.S. Bankruptcy Court for the District of Rhode Island.

On September 12, 1997, plaintiff filed his First Status Report pursuant to the Court's Order To File First Status Report issued on July 31, 1997. Plaintiff's First Status Report noted the pendency of the *Bessette* Action and plaintiff's intent to seek the voluntary dismissal of this action. On September 16, 1997, Avco Financial Services of Southern California filed an answer to plaintiff's complaint as well as a First Status Report. Plaintiff moved to voluntarily dismiss this action on September 22, 1997.

On about September 25, 1997, the Court denied plaintiff's motion for voluntary dismissal pursuant to Fed. R. Civ. P. Rule 41(a)(1) without prejudice. On September 25, 1997, Avco Financial Services of Southern California objected to plaintiff's motion to dismiss and filed a First

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[1] References to Camhy Decl. Exh. A refer to Exhibits attached to the Declaration of Abraham Camhy In Support Of Plaintiff's Motion For Voluntary Dismissal.

Amended Status Report. A status conference has been scheduled for October 29, 1997.

## ARGUMENT

A. Plaintiff's Motion For Voluntary Dismissal Pursuant To Fed. R. Civ. P. 41(a)(1) Should Be Granted Because The Named Defendant Has Not Answered

Fed. R. Civ. P. 41(a)(1) provides that an action may be voluntarily dismissed by a plaintiff "by filing a notice of dismissal at any time before service by the adverse *party* of an answer or of a motion for summary judgement, whichever first occurs." "Party" is a technical term of art which refers only to those by or against whom a legal suit is brought, all others who may be affected directly or consequently are interested persons, but not parties. *See* Black's Law Dictionary, Revised 6th Ed. (1990); *see also Golatte v. Mattews* 394 F.Supp. 1203, 1207 (D.C.Ala 1975). Plaintiff has not waived the right to seek voluntary dismissal of this action, because the sole defendant named in this action, Avco Financial Services, Inc. ("Avco Financial Services") have not yet filed an answer to plaintiff's complaint. Avco Financial Services is a Delaware corporation which is principally engaged in consumer finance and insurance activities. Avco Financial Services is self-described in its Form 10-K filed with the Securities and Exchange Commission on March 28, 1997 ("Form 10-K") as follows:

> *Avco Financial Services, Inc., which was organized under the laws of Delaware on July 17, 1964, is the successor to the finance businesses of Seaboard Finance Company, originally established in 1927,*

*and Delta Acceptance Corporation Limited, originally established in 1954.* Unless the context otherwise requires, the term "Registrant" or "AFS" herein refers to Avco Financial Services, Inc. and its consolidated subsidiaries.

All of the Registrant's outstanding common stock is owned by Textron Inc.

*The Registrant is principally engaged in consumer finance and insurance activities.* The Registrant's finance operations mainly involve loans made by the Avco Financial Services Group. Such loans consist primarily of consumer loans which are unsecured or secured by personal property and are in relatively small amounts and for relatively short periods; real estate loans which are secured by real property in larger amounts and for considerably longer periods; and retail installment contracts, principally covering personal property. *As of December 31, 1996, the Registrant operated 1,235 finance offices located in all states of the United States* (except Arkansas, Kansas, Mississippi, Oklahoma and Vermont), the Commonwealth of Puerto Rico, the Virgin Islands, all Canadian provinces and the Yukon territory, six Australian states and the Australian Capital Territory, Hong Kong, New Zealand, Spain and the United Kingdom. [Emphasis added]

The Form 10-K of Avco Financial Services, further, appears to indicate that Avco Financial Services maintains the nationwide lending policies and practices of affiliated entities:

Lending Policies

In conducting lending activities, it is the policy of the *Registrant* to require a satisfactory credit history. *Loans are made to individuals primarily on the basis of the borrower's income and are limited to amounts which the customer appears able to repay without hardship.* Investigation of the creditworthiness of obligors is made either through credit agencies or by the Registrant's own agents. When security is taken in connection with a loan, the realizable value of the property on which liens are taken as security is in many cases less than the amount of the related receivable (except for real estate in which case the loan amount is limited to a maximum of 85% of the unencumbered appraised market value).

*Subject to governmental restrictions the Registrant [illegible] loans secured by consumer goods for varying periods,* with original contractual terms generally not exceeding 4 years. Loans secured by real estate generally do not exceed 15 years. During 1996, the weighted average maturity of real estate loans written was approximately 10 years. *The Registrant purchases retail installment contracts with original contractual terms generally not exceeding 3 years.* [Emphasis added]

*See* Camhy Decl. Exh. B.

Plaintiff's selection of Avco Financial Services to be named as defendant in this action did not arise from a mistake or a clerical error.[1] Avco Financial Services of

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[1] Avco Financial Services was the creditor at the time of the plaintiff's bankruptcy. *See* First Amended Status Report of Avco Financial Services of Southern California at p. 2.

Southern California should not be permitted to rewrite plaintiff's complaint. Plaintiff brought this action against Avco Financial Services and, therefore, should not be forced to maintain this action because an entity which plaintiff did not choose to sue, chose to answer. Avco Financial Services of Southern California does not have standing to object to plaintiff's motion for voluntary dismissal, because Avco Financial Services of Southern California is not named in plaintiff's complaint.

B. Alternatively, Plaintiff's Request For Voluntary Dismissal Pursuant To Fed. R. Civ. P. 41(a)(2) Should Be Granted

Fed. R. Civ. P. 41(a)(2), governing voluntary dismissal by court order, provides in part: "Except as provided in [rule 41(a)(1)], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." Fed. R. Civ. P. 41(a)(2). "[I]n most cases a dismissal should be granted unless the defendant will suffer some legal harm." *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976). Plain legal prejudice "does not result simply when defendant faces the prospect of a second lawsuit or when plaintiff merely gains some tactical advantage." *Hamilton v. Firestone Tire & Rubber Company, Inc.* 679 F.2d 143 (9th Cir. 1982); *see also Durham v. Florida East Coast Railway Company*, 385 F.2d 366, 368 (5th Cir. 1967)).[2] Thus, assessed opportunity for a legal ruling

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[2] In *Durham*, the court held that trial court had abused its discretion by dismissing an action with prejudice after plaintiff's counsel had requested a voluntary dismissal even

alone is not sufficient to warrant the denial of a motion for voluntary dismissal.[3] *Id.*

Avco Financial Services of Southern California has objected to plaintiff's dismissal of this action on the ground that witnesses which may be relevant to the plaintiff's case are located in California. *See* Avco Financial Services of Southern California's First Amended Status Report at p. 2. However, issues of convenience do not rise to the level of legal prejudice.[4] The Ninth Circuit has held that "forum non coneviens" [sic] issues raised by the opposing party are "inapplicable to motions to dismiss under Rule 41(a)(2)". *Hamilton* 679 F.2d 143, 146. In *Hamilton*, the Ninth Circuit affirmed the District Court's dismissal *without* prejudice of an action where plaintiff sought to pursue a pending parallel claim in a different state after discovery had commenced, a counterclaim and

---

though a jury of twenty-three had been assembled and trial was about to commence. *Id.*

[3] Moreover, an order granting a plaintiff's motion for voluntary dismissal only upon conditions imposed by the court cannot be given immediate effect. The plaintiff has "a *reasonable period of time* within which [either] to refuse the conditional voluntary dismissal by withdrawing (the) motion for dismissal or to accept the dismissal despite the imposition of conditions." *Lau v. Glendora Unified School District*, 792 F.2d 929, 931 (9th Cir. 1986); *see also Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342-43; corrected, 773 F.2d at 1049 (9th Cir. 1985) (a dismissal with prejudice was appealable, whether voluntary or involuntary).

[4] Plaintiff, if requested, would voluntarily cooperate to minimize any inconvenience to Avco Financial Services of Southern California arising from plaintiff's voluntary dismissal of this action.

cross-claim had been filed and defendant had commenced trial preparations. In *Hamilton,* the Ninth Circuit held that:

> *The doctrine of forum non conveniens is equally inapplicable to motions to dismiss under Rule 41(a)(2).* The doctrine rests on the principle that a court may resist imposition upon its jurisdiction when the matter may be more conveniently tried in another forum, even when jurisdiction is authorized by the letter of a general venue statute. *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947). *In passing on a plaintiff's request to remove himself from the jurisdiction of the court, the court is not asked to decide whether its jurisdiction is proper and convenient.* The District Court, therefore, did not err in failing to consider expressly [illegible] doctrine of forum non conveniens in connection with the motion under Rule 41(a)(2). (footnote omitted) [Emphasis added]. *Id.*

Avco Financial Services of Southern California will suffer no legal prejudice as a result of the voluntary dismissal of this action. Avco Financial Services of Southern California was given early notice in Plaintiff's First Status Report that plaintiff intended to seek the voluntary dismissal of this action. Avco Financial Services of Southern California was, thus, aware of plaintiff's intentions at the time that it answered plaintiff's complaint. Moreover, the only effort and expenses that has been incurred by Avco Financial Services of Southern California has resulted from (a) its insistence on appearing and answering as a defendant in an action in which it was not named as a party; and (b) its efforts to oppose plaintiff's

attempts to have this action voluntarily dismissed. Moreover, Avco Financial Services and Avco Financial Services of Southern California would realize a substantial savings by allowing this matter to be voluntarily dismissed at such an early stage of the litigation.

No prejudice would result to the proposed class because (a) the *Bessette* Action seeks to represent a nationwide class of persons similarly situated to the plaintiff; (b) the *Bessette* Action is being litigated by, among others, the highly skilled law firm of Edelman & Combs which has substantial experience in creditor and debtor law as well as in class action litigation; and (c) this action is new, and has not in any way been publicized and, therefore, no member of the proposed class has relied on the filing of plaintiff's action. *See Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989).

In addition, allegations of violations of Racketeer Influenced And Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961, contained in *Bessette* Action which seeks to represent a nationwide class could not be maintained in this Court. The amendment of plaintiff's complaint to include causes of action pursuant to RICO and/or Truth and Lending Act (the "TILA"), 15 U.S.C. §1637 and regulation Z, 12 C.F.R. §226.7 and §226.5(c), would subject this action to mandatory removal from this Court pursuant to 28 U.S.C. §157(d). *See In re Combustion Equipment Associates, Inc.*, 67 Bankr. 709 (S.D.N.Y. 1986).

Moreover, to the extent that the action pending before this court is otherwise substantially duplicative of the *Bessette* action, the maintenance of duplicative actions in multiple districts could result in conflicting rulings

and would result in a generally undesirable duplication of effort. The dismissal of this action without prejudice would further the efficient adjudication of a single wrongful course of conduct in a single forum and will cause no plain legal prejudice to Avco Financial Services of Southern California.

## CONCLUSION

Plaintiff respectfully requests the voluntary dismissal of this action for the foregoing reasons.

Dated: October 6, 1997

Respectfully submitted,
Francisco Gonzalez
By his attorneys

By: /s/ Abraham Camhy

Abraham Camhy, SBN #170224
LAW OFFICES OF
ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
phone: (415) 241-9093

Jules Brody
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
phone: (212) 687-7230

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury that the following is true and correct. I am a citizen of the United States, over 18 years of age, employed at 354 Franklin Street, San Francisco, California 94102, and not a party to this action. I hereby certify that on this day I caused a true and correct copy of the foregoing Plaintiff's Notion of Motion [sic] For Voluntary Dismissal; Motion For Voluntary Dismissal; Memorandum Of Points and Authorities; and Declaration Of Abraham Camhy In Support Of Plaintiff's Motion to be served upon Avco Financial Services, Inc., Avco Financial Services of Southern California, Inc., and counsel for Avco Financial Services of Southern California, Inc., Stephen R. Cornwell and Stephen E. Carroll of McCormick of Barstow, Sheappard, Wayt & Carruth LLP, by mailing a copy of same by Federal Express addressed to each of the following:

AVCO FINANCIAL SERVICES, INC.
By serving Laila Soares, Assistant
Corporate Vice President, Authorized
to Accept Service
600 Anton Blvd.
Costa Mesa, CA 92626-7417

Stephen R. Cornwell
Stephen E. Carroll
McCORMICK, BARSTOW, SHEAPPARD,
WAYT & CARRUTH LLP
P.O. Box 28912
Fresno, CA 93729-8912

DATED: October 6, 1997

/s/ Abraham Camhy
ABRAHAM CAMHY

ABRAHAM CAMHY, SBN 70224
LAW OFFICES OF ABRAHAM CAMHY
345 Franklin Street
San Francisco, California 94102
(415) 241-9093

JULES BRODY
STULL, STULL & BRODY
6 East 45th Street
New York, New York 10017
(212) 687-7230

Attorneys for Plaintiff

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF CALIFORNIA**
**MODESTO DIVISION**

| | |
|---|---|
| FRANCISCO GONZALEZ,<br>Debtor, | Case No. 96-94507-A-07 |
| FRANCISCO GONZALEZ, on behalf of himself and all others similarly situated,<br>Plaintiff,<br>v.<br>AVCO FINANCIAL SERVICES, INC.,<br>Defendant. | Adversary Preceding No. 97-9145-A<br>MC No. AC-2<br>*Class Action*<br>DECLARATION OF ABRAHAM CAMHY IN SUPPORT OF PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL |

**I Abraham Camhy hereby declare, under penalty of perjury, that:**

1. I am counsel to plaintiff Francisco Gonzalez in the above captioned matter.

2. This declaration is submitted in support of Plaintiff's Motion For Voluntary Dismissal.

3. Attached hereto as Exhibit A is a true and correct copy of the Complaint filed in the action entitled *Bessette v. Avco Financial Services, et al.*, Civil Docket Number 97-CV-487 (the "Bessette Action"), pending in the U.S. District Court for the District of Rhode Island (Providence).

4. Attached hereto as Exhibit B is a true and correct copy of the Form 10-K of Avco Financial Services, Inc. which was filed with the Securities and Exchange Commission on or about March 28, 1997.

Dated: October 6, 1997

By: /s/ Abraham Camhy

Abraham Camhy,
SBN #170224
LAW OFFICES OF
ABRAHAM CAMHY
345 Franklin Street
San Francisco, California
94102
phone: (415) 241-9093

**[EXHIBIT E]**

UNITED STATES BANKRUPTCY COURT
Eastern District of California

In re (Debtors): Francisco Gonzalez
Case Number: 96-94501
Account Number: 745808768
Address: 5316 Clark St PO Box 219 [illegible] Ca 93325
Home Phone: 668-3239
Employer: _____

**AGREEMENT TO REAFFIRM**

Whereas on the date of filing bankruptcy, Debtor was indebted to Avco Financial Svs. ("Creditor") as evidenced by a promissory note and security agreement (if any) dated 8/23/96, and upon which remains an unpaid balance of $410.08 secured by ___ personal property, ___ motor vehicle, ___ real estate, or ___ unsecured.

Now therefore, Debtor wishes to retain the collateral, settle Creditor's claims of nondischargeability under §523, and/or repay the original dischargeable obligation pursuant to Debtor's rights under the Bankruptcy Code. Debtor reaffirms and agrees to pay the Creditor the sum of $ 410.08 at 21.79% interest per annum, by making monthly payments of $ 20.00, at 21.79% interest per annum, payable on the 20 day of each and every month beginning 2-20-97 and all subsequent installments on the same day of each month until paid in full. If the full balance of the debt is reaffirmed, the Debtor agrees to be bound by all the other terms of the original loan documents.

THE DEBTOR UNDERSTANDS THE THIS AGREEMENT IS NOT REQUIRED BY BANKRUPTCY LAW, NON-BANKRUPTCY LAW OR BY ANY

AGREEMENT NOT IN ACCORDANCE WITH THE BANKRUPTCY CODE; AND THAT THIS AGREEMENT SHALL BE BINDING ON EACH PARTY AS A VALID CONTRACT WHICH, IN THE EVENT OF DEFAULT, MAY BE ENFORCED BY THE CREDITOR BY JUDGMENT OR OTHER APPROPRIATE LEGAL MEANS.

THIS REAFFIRMATION AGREEMENT MAY BE RESCINDED AT ANY TIME PRIOR TO DISCHARGE OR WITHIN 60 DAYS AFTER IT HAS BEEN FILED WITH THE COURT, WHICHEVER OCCURS LATER, BY GIVING WRITTEN NOTICE OF THE RESCISSION TO THE CREDITOR.

In the event Debtor does rescind, Debtor is aware that Creditor will keep all payments made and may be entitled to other remedies including taking possession of any collateral. Debtor certifies that this agreement is purely voluntary, is not an undue hardship and is entered into before the discharge date.

Dated this 20 day of Dec 1996

Creditor _____

Debtor /x/ Francisco Gonzalez

Co-Debtor _____

Debtor's Attorney Declaration: The above Reaffirmation Agreement represents a fully informed and voluntary agreement by the Debtor(s) and does not impose an undue hardship upon the Debtor(s) or dependents of the debtor(s) and I have fully advised the Debtor(s) of the legal effect and consequences of this agreement and of any default under this agreement.

Date _____ Attorney _____

**EXHIBIT F**

Avco Financial Services,
Aurora, CO

[Original copy illegible]

This letter is concerning the interest of Avco Financial Services with regard to your obligation to it in the sum of $643.34.

[Illegible]

1. To reaffirm the entire debt, should you desire to pay off the debt and keep the property;

2. To redeem the property by immediately forwarding to this office the fair market value of the property, to wit, the sum of $ 480.00.

**EXHIBIT G**

**$ 643.34**
**$ 643.34**
**$ 40.00**

[Balance of original document illegible]

**EXHIBIT H**

**UNITED STATES BANKRUPTCY COURT**
**FOR THE**
**REDEMPTION AGREEMENT**

$ 480.00 [Balance of original document illegible]

**EXHIBIT I**

Personal Money Order 930783
to AVCO Financial Services

**EXHIBIT J**

Avco Financial Services
[illegible]
3300 S. Parker Rd, Ste. 603
Aurora, CO 80014
303 743 4511

AVCO FINANCIAL SERVICES

DATE: 25 January 1993
NAME: Nancy [illegible]

ACCOUNT #: 799-2907-0000-85285

CURRENT BALANCE: $393.34 after $250.00 pa/part is deducted

AMOUNT DUE: None – Account Settled in Full for $ 250.00

AMOUNT PAST DUE: N/A

DATE PAYMENT DUE: N/A

LAST PAYMENT AMOUNT: $ 250.00

DATE LAST PAYMENT: 25 JANUARY 1993

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Per our agreement your payment for $ 250.00 will Settle this Account. Also per our Settlement Agreement Avco Financial Services releases you from any liability on the deficient balance. We appreciate your willingness to resolve this [illegible] and if there is anything else we can provide [illegible] please let us know.

/s/ _____

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## AFFIDAVIT
## OF CHERYL BESSETTE

I, Cheryl Bessette, being duly sworn under oath, depose and state the following to the best of my recollection:

1. That I purchased a mattress and bedroom set from Cardi's Furniture Store on a revolving charge account which was financed by Avco-RI.

2. That I filed for Bankruptcy on August 7, 1995, and listed Cardi's (Avco-RI) as one of my creditors on my petition.

3. That sometime shortly after filing my bankruptcy, I had an initial telephone conversation with an Avco representative. The representative was very rude and told me, "Who do you think you are? Do you think you can just file for bankruptcy and keep the merchandise? We either need our furniture back or you must pay what you owe us." I was also told that if I did not pay my account in full, my furniture would be repossessed because they could re-sell my used mattress and bedroom set.

4. That prior to receiving my discharge in bankruptcy, I was contacted by another Avco representative who threatened to repossess my furniture if I did not agree to sign a reaffirmation agreement for $1500.00, payable at $100.00 per month at twelve percent (12%) interest.

5. That, although my attorney originally advised me not to sign the reaffirmation agreement, I signed it due to Avco's threats to repossess my furniture.

6. That I signed a reaffirmation agreement with Avco on September 29, 1995, for $1500.00, payable at $100.00 per month at twelve percent (12%) interest.

7. That after receiving my discharge in bankruptcy on November 2, 1995, Avco representatives telephoned me at my home on at least two separate occasions to inquire whether I would be making my reaffirmed payments, as I had become delinquent on some of these payments.

8. That after receiving the telephone calls from Avco regarding my delinquent payments, I made several double payments of at least $200.00 per month in fear that my furniture would be repossessed.

/s/ Cheryl Bessette

**Cheryl Bessette**

Subscribed and sworn to before me at Pawtucket, this 1st day of March, 1999.

/s/ _____

Notary Public

**Form 8, INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION**

**UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND**

In re JOSEPH F. BESSETTE, & CHERYL A. BESSETTE, husband and wife,
Debtor

Case No. _____

Chapter Chapter 7

**CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION**

1. We, the debtors have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. Our intention with respect to the property of the estate which secures those consumer debts is as follows:

a. *Property to Be Surrendered.*

| | Description of Property | Creditor's name |
|---|---|---|
| 1. | bracelet | Kay's Jeweler's |
| 2. | | |
| 3. | | |

b. *Property to Be Retained. [Check applicable statement of debtor's intention concerning reaffirmation, redemption, or lien avoidance.]*

| Descripton of property | Creditor's name | Debt will be reaffirmed pursuant to § 524(c) | Property is claimed as exempt and will be redeemed pursuant to § 722 | Lien will be avoided pursuant to § 522(l) and property will be claimed as exempt |
|---|---|---|---|---|
| 1. 115 Dawn Marie | GE Mortgage Services | ✓ | | |
| 2. Apple Performa | APEX | | ✓ | |
| 3. 1993 stove | Lechmere | | ✓ | |
| 4. 1993 refrigerator | Lechmere | | ✓ | |
| 5. 1994 Zenith TV | Jordan Marsh | | ✓ | |
| 6. headboard, night table | Cardi's | | ✓ | |
| 7. lawnmower | Sears | | ✓ | |

3. We understand that § 521(2)(B) of the Bankruptcy Code requires that we perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period fixes.

Date: _____ _____

Signature of Debtor
JOSEPH F. BESSETTE

Date: _____ _____

Signature of Codebtor
CHERYL A. BESSETTE

(Continued)

**Form 8, INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION**

**UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND**

In re JOSEPH F. BESSETTE, & CHERYL A. BESSETTE, husband and wife,
Debtor

Case No. _____

Chapter Chapter 7

**CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION**

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2. My intention with respect to the property of the estate which secures those consumer debts is as follows:

a. *Property to Be Surrendered.*

| | Description of Property | Creditor's name |
|---|---|---|
| 1. | None | |
| 2. | | |
| 3. | | |

b. *Property to Be Retained. [Check applicable statement of debtor's intention concerning reaffirmation, redemption, or lien avoidance.]*

| Descripton of property | Creditor's name | Debt will be reaffirmed pursuant to § 524(c) | Property is claimed as exempt and will be redeemed pursuant to § 722 | Lien will be avoided pursuant to § 522(l) and property will be claimed as exempt |
|---|---|---|---|---|
| 1. 1990 Mercury | GMAC | ✓ | | |
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |

3. I understand that § 521(2)(B) of the Bankruptcy Code requires that I perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period fixes.

Date: _____ _____

Signature of Debtor
JOSEPH F. BESSETTE

---

**CERTIFICATION OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)**

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed or Typed Name of Bankruptcy Petition Preparer

_____
Social Security No.

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____

Signature of Bankruptcy Petition Preparer

Date

*A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.*

(Continued)

[LOGO] Form 88 (6-90) Julius Blumberg, Inc. NYC [Illegible]

**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF RI**

In re: Bessette, Joseph & Cheryl

Debtor(s) Case No.
Chapter

CHAPTER 7 INDIVIDUAL DEBTOR'S STATEMENT OF INTENTION

1. I, the debtor, have filed a schedule of assets and liabilities which includes consumer debts secured by property of the estate.

2. My intention with respect to the property of the estate which secures those consumer debts is as follows:

*a. Property to Be Surrendered.*

| Description of property | Creditor's name | H, W or J |
|---|---|---|

(See prior 2 pages)

*b. Property to Be Retained (Specify, Reaff'd, Red'd or Exempt to state debtor's intention concerning reaffirmation, redemption, or lien avoidance".)*

| Description of property | Creditor's name | Reaff'd Red'd Exempt |
|---|---|---|

3. I understand that § 521(2)(B) of the Bankruptcy Code requires that I perform the above stated intention within 45 days of the filing of this statement with the court, or within such additional time as the court, for cause, within such 45-day period fixes.

Date: 8/3/95

Reaff'd – Debt will be reaffirmed pursuant to § 524(c)

Red'd – Property is claimed as exempt and will be redeemed pursuant to § 722

Exempt – Lien will be avoided pursuant to § 522(l) and property will be claimed as exempt

/s/ Joseph F. Bessette
Signature of Debtor

/s/ Cheryl A. Bessettee
Signature of Debtor

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